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IMPLICATIONS OF IMMIGRATION REFORM ON THE WORKERS COMPENSATION SYSTEM

JOHN P. HARRIS AND VINCENT M. TENTINDO

The outcome of the growing debate over the millions of undocumented workers in the United States will surely have a significant impact on the administration of workers compensation systems across the country.¹ In Massachusetts, employers have already gotten a sense of what this impact will be, as the state Department of Industrial Accidents (DIA) has already resolved that injured workers who are in the country illegally are entitled to workers compensation benefits.

Using Massachusetts as an example, this article will focus on the financial and administrative implications of ongoing efforts to extend workers compensation coverage to undocumented workers. The article will also discuss some initiatives of the DIA, the legislature, and public interest groups to

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CONCLUSION

Fully integrating immigrant workers into our economic system would involve providing them a reasonable expectation that income-tax withholding, Social Security taxes, insurance benefits mandated by law, and the minimum wages established by the legislature are paid. This full integration hasn't happened yet. Until then, immigrant workers will continue to struggle to receive the basic benefits that most states require be provided to all its workers. If our elected leaders fail to address this many-faceted problem or undertake only half-hearted and incomplete corrective actions similar to what occurred in 1986 (most of the currently proposed remedies are identical to those enacted in 1986 except the size and scope of the problem has greatly increased), such a course will continue to drive up costs paid by the legitimate employers across the country. It will also drive immigrants — both legal and illegal — further apart from the rest of us within our economic and political system, breeding resentment and unrest, as is currently unfolding in several European countries.

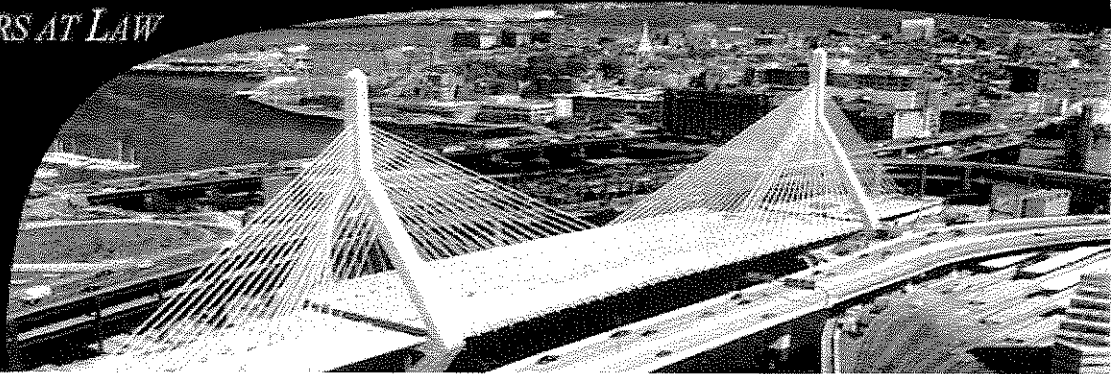
Regardless of the reader's private view on how the federal government should resolve this important issue of immigration control, it must be addressed in some fashion. Out-of-control workers compensation costs in the late 1980s were one of the major factors that drove many reputable employers away from the Commonwealth of Massachusetts and thereby set the stage for the Commonwealth's Workers' Compensation Reform Act of 1991. Today's challenge involves more than just workers compensation and is significantly more far-reaching. Every aspect of our social structure and our economy is affected by this growing problem.

Members of the workers compensation insurance profession understand how all of the components of our complex employment process interact in our national economy. We understand the public policy that has evolved over the last century to provide a safer workplace for everyone. We work every day to ensure that on-the-job injuries are properly treated as an integral cost of doing business to be borne by employers, not by general taxation. We also understand how all of the separate strands of the United States' social safety net must be coordinated and seamlessly meshed together for the common good of our society. Those of us who earn our own wages within the workers compensation industry have an obligation to provide knowledgeable input to this important national debate. We must ensure that a well-reasoned, thoughtful, and thorough reform is accomplished by sharing our unique expertise with lawmakers. We owe it to our children and ourselves. And we also owe it to the memory of our own immigrant ancestors who came before and struggled to create the system that has worked so well for us.

John P. Harris is the second injury fund manager at Tentindo, Kendall, Canniff & Keefe, LLP, in Boston. Prior to joining the firm, he served as an administrative judge at the Massachusetts Department of Industrial Accidents for 10 years. Vincent M. Tentindo is managing partner at Tentindo, Kendall, Canniff & Keefe, LLP, and an adjunct professor at New England School of Law, where he teaches a course in workers compensation. Both Harris and Tentindo frequently conduct seminars on workers compensation topics for the Council on Education in Management. They can be contacted at jph@tkcklaw.com and vmt@tkcklaw.com.

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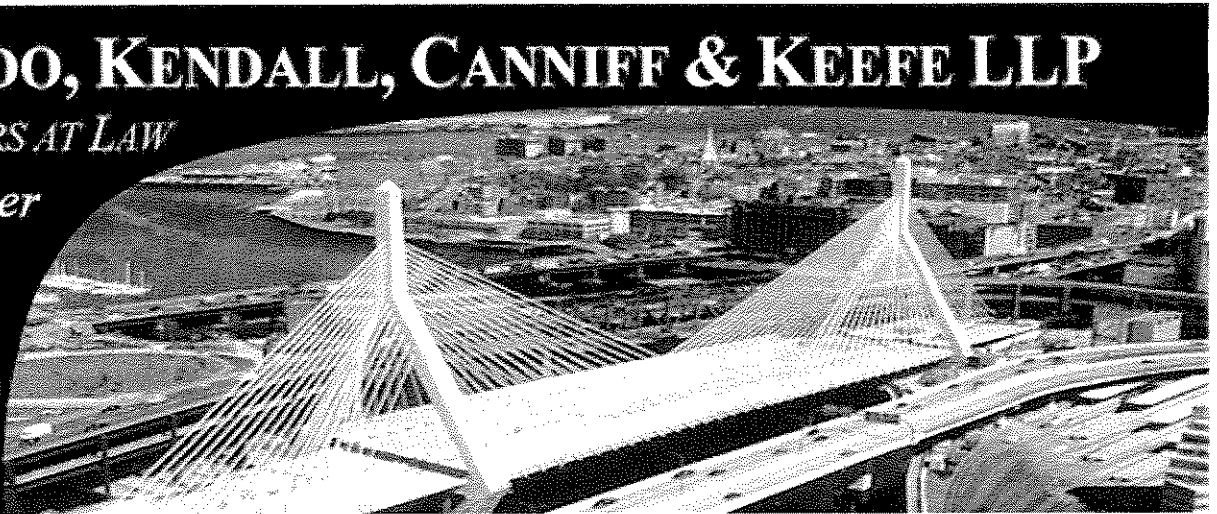
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MA W/C Advisory Council Annual Report:

Injured Workers in MA Paid Benefits Quicker than other States

A recent study by the Workers' Compensation Research Institute (WCRI) compared the performance of Massachusetts to 11 other key states, which together represent nearly 60% of the nations workers' compensation benefits. According to the study, Massachusetts continued to have the fastest time from injury to first indemnity payment. In addition, the WCRI found that the vast majority of injured workers were satisfied with the medical care they received.

In fiscal year 2005, three new insurance companies entered the marketplace in Massachusetts. Also for the first time in seven years, both workers' compensation insurance rates and employer assessments were reduced. Workers' compensation premiums were decreased 3% while employer assessments were reduced 11%. Those employer assessments are currently the focus of an audit process by the DIA to verify the accuracy of assessments collected from the insurance industry. Prior to this project, the DIA relied upon insurers to self-report and pay the appropriate assessment amounts collected from employers. At the end of the initial phases of the audit, a total of \$9.5 million was collected as a result of underpaid assessments.

One key area in which the trend has been negative concerns payments by the Trust Fund to injured workers whose employers do not have the mandatory insurance coverage. In fiscal year 2005, approximately \$6,052,205 was paid to those injured workers from the Fund, which is financed through assessments on employers who have workers' compensation insurance. Since fiscal year 2000, the amount the Trust Fund has paid out each year has doubled from \$3,390,180. In just the last two fiscal years, payments went up from \$4,375,208 to \$6,052,205. The Trust Fund, DIA, and the Advisory Council have set up a Task Force to address the issue of uninsured employers, and will recommend both stricter enforcement efforts and legislative initiatives to combat this growing problem.

The Advisory Council reported that during fiscal year 2005, the DIA experienced a slight reduction in the number of total workers' compensation cases filed. Since the enactment of the Workers' Compensation Reform Act of 1991, the number of cases filed at the DIA has decreased by 64%. Employee claims, which account for 75% of the total cases filed, increased by 158 cases in FY'05 but have decreased by 45% since 1991. The number of requests for a discontinuance or

modification of benefits by insurers, which account for 15% of the total cases, decreased by 117 cases in FY'05 and have decreased by 77% since the 1991 Reform Act.

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Beacon Hill Considering Revisions To Workers' Comp. Law

The Legislature is considering a bill that would make changes to six separate aspects of the Workers' Compensation Act in Massachusetts. The proposed changes are:

Employee leasing companies shall be required to obtain a workers' Compensation insurance policy for all of the employees that they provide to client companies. Temporary staffing agencies would be exempt from this revision to §14A.

Third-party lawsuits against anyone other than such leasing companies and their client companies will not be barred by this change, as long as both the leasing company and their client company are in compliance with Chapter 152.

Class-action suits by 10 or more employees of an uninsured employer will be permitted to recover damages based on the amount of workers' compensation premiums that should have been paid by that employer. After certification of probable cause by the Attorney General or Superior Court, any proceeds ordered in a civil action or under a settlement will be deposited in the Workers' Compensation Trust Fund.

Intoxication or illegal drug use will now be considered "serious willful misconduct", and if that is the cause of an otherwise compensable injury, the employee shall be barred from receiving compensation.

Funeral expenses will be increased from the present amount of \$4000 to \$8000 under §33.

Bodily disfigurement benefits under §36 will be broadened to cover beyond the present face, neck and hand only limitation. At the discretion of a Judge, the amount can range up to twenty-nine times the State Average Weekly Wage under this revision to §36 (k).

Those who have an interest in this pending legislation should contact their Representative or Senator to provide their input. TKCK will keep its clients posted on the progress of this legislation.

New DIA Commissioner Appointed

Effective February 6, 2006, Henry J. Swiniarski became the Commissioner of the Department of Industrial Accidents, replacing John C. Chapman who moved to the Department of Labor and Industries. Mr. Swiniarski was most recently Assistant Secretary of Health & Human Services for the Commonwealth.

Massachusetts Workplace Injuries Well Below National Average

Bay State Lowest in New England

The Massachusetts Division of Occupational Safety recently released 2004 data on workplace illness and injury rates that shows the Bay State below the national average and best among reporting New England states. Massachusetts had an incidence rate of 4.3 injuries and illnesses per 100 full-time equivalent workers (FTEs), compared to the national rate of 4.8 cases per FTEs. Among reporting New England states, Massachusetts was the only state below the national average. Massachusetts' rate improved from 4.6 cases per 100 FTEs in 2002.

Survey data is compiled by the Occupational Safety and Health Survey Program, a federal-state government partnership between the U.S. Department of Labor's Bureau of Labor Statistics and Massachusetts' Division of Occupational Safety. "We are committed to making workplaces in Massachusetts as safe as possible," said John Ziemba, Director for the Department of Labor. "While continued improvement remains a priority, reductions in work-place illnesses and injuries make Massachusetts businesses and workers healthier, happier and more productive." Approximately 45 percent of overall workplace illnesses and injuries did not result in lost workdays. The injury and illness incidence rate among the smallest businesses (those with one to ten employees) was 1.4 per 100 FTEs. "Increased cooperation between state and federal agencies and the business and labor communities on workplace safety is yielding positive results," said Robert J. Prezioso, Division of Occupational Safety Commissioner. "This information is useful to businesses that continue to seek ways to make their workplaces as safe as possible."

For specific data on the various job categories tracked by the Occupational Safety and Health Survey Program, please visit www.bls.gov. On the homepage under the "Safety and Health" category, click on "Profiles." The Division of Occupational Safety has also published industry-specific reports on private sector injuries and illnesses in 2004, available at <http://www.mass.gov/dos>.

New Trend Developing For Recovery of Medical Costs On Compensation Claims

The industry trade publication *Business Insurance* recently reported on a new trend by major self-insured employers to file subrogation suits against hospitals and doctors to recoup workers' compensation benefits paid to workers following negligent care or procedures that prolonged the disability period. Patients who, for example, contract infectious diseases or suffer a mishap during treatment have always had a right to file suit for personal damages in such cases, and their recovery was usually subject to a lien on behalf of the insurer who paid additional benefits as a result. Oftentimes, a statute of limitations prevented such actions from being successful.

In the present era of cost-cutting and more aggressive monitoring of claims, it is appropriate for employers and self-insurers to more aggressively pursue such recoveries directly, without waiting for the injured worker to do so. While the total value of such recoveries may be a small part of the insurers' overall business actions, doctors and hospitals are more likely to reach an early settlement with major employers and large insurance groups with whom they do significant amounts of continuing business.

These recoveries are usually focused on actual, proven expenses and are much easier to quantify, since they do not involve other aspects of an injured workers' potential claims against those institutions. TKCK has several staff members who regularly deal with such issues and are available to assist our clients if they identify a case in which medical mishaps occur during treatment for a workers' compensation injury. For more information, contact Vincent M. Tentindo directly.



All of New England was blanketed by a powerful snowstorm recently. The "Commandant's House" at the Charlestown Navy Yard was especially picturesque.

DIA Reviewing Board Toughens Stance on Policy Cancellations

In a recent split decision, the Reviewing Board has made requirements for cancelling workers' compensation insurance policies even more onerous. In this case of first impression, two members of the Reviewing Board ruled that (1) where an employer failed to pay a premium on its workers' compensation insurance policy, (2) the insurer mailed a notice of cancellation to the employer's mailing address of record in the policy, (3) the notice of cancellation was returned as "undelivered" and (4) the insurer did not subsequently attempt another delivery to an additional address that was included within the policy, "the cancellation was not effective and the insurance company was therefore liable when one of the employer's workers suffered an industrial injury several months after the attempted cancellation."

An administrative judge's hearing decision was thereby confirmed by the majority: "This case involves the insurer's actual knowledge of non-receipt of the properly mailed cancellation notice, due to the return of its letter as undeliverable at that address. The salient additional fact is the presence of the alternative address in the insurer's record. We find that once it knew that notice was not delivered to the primary address listed in its records, the insurer had an obligation to attempt service at that alternative address."

Judge Costigan dissented, stating: "The majority holds that if the insurer, after the mailing of a notice of cancellation to the insured employer's address listed in the policy for such notices, learns that the address is no longer valid, it is required to send another notice to any other address listed in the policy, or known to it, in order effect cancellation. Because the plain language of G.L.c.175, §187C, does not impose such a requirement..., I respectfully dissent." It is expected that this ruling will be appealed to the MA Appeals Court by the insurer.

Overheard In Court:

Q: The youngest son, the twenty-year old: how old is he?

Q: She had three children, right?

A: yes.

Q: How many were boys?

A: None.

Q: Were there any girls?

SJC: "Big Dig" Workers Entitled To Higher Comp than Others

The Massachusetts Supreme Judicial Court has issued a decision in the *McCarty* case which involved whether or not fringe benefits mandated under the "Prevailing Wage" statute should be included in the calculation of workers' compensation benefits. The central issue revolved around the question of whether the "prevailing Wage" law (G.L. c.149, §§26 and 27) requires the union fringe benefits be added to the injured worker's weekly wage in order to calculate indemnity benefits. The Administrative Judge who wrote the initial decision in 1996 determined that such a calculation should only take place on those public works projects in which both union and non-union workers participated. He ruled that the intent of the Prevailing Wage statute was to require the actual value of those union benefits be paid in cash to the non-union workers so that they could purchase similar benefits on their own, if they so chose. This would comport with §1 (1) of the Workers' Compensation Act that provides: "...such fringe benefits as health insurance plans, pensions, day care, or education and training programs provided by employers shall not be included in employee earnings for the purpose of calculating average weekly wages under this section." The Reviewing Board reversed that finding, and the case was eventually taken up by the SJC on their own initiative.

Three of the seven Justices disagreed with the majority, but voted to concur in the decision. Justice Sosman wrote: "As untenable as I think the reviewing board's interpretation was, the presumption that the Legislature was aware of that interpretation forces me to interpret the ambiguous cross-reference in G.L. c.152, §1 (1), as endorsing the reviewing board's approach. I therefore must concur in the interpretation announced today, however problematic it may be." She added: "There are several reasons suggesting that *McCarty*'s interpretation would not have been intended by the Legislature. To begin with, there is no reason why a system that is designed as a cash replacement system, and that has long excluded fringe benefits from that system, would suddenly include them for workers who happen to receive their fringe benefit package while working on a public construction project. There is nothing about public construction, as opposed to any other form of construction work (or any other form of employment, for that matter), that would make it necessary or appropriate to increase workers' compensation benefits in a manner that went beyond the replacement of lost cash income. While the insurer's proposed

interpretation is consistent with the underlying purpose of workers' compensation, *McCarty*'s is not."

The impact of this unusual ruling will be felt on all future public works projects throughout Massachusetts, including the building of roads, bridges, schools, town halls, and police or fire department buildings that are constructed with public funds. At a time when the Legislature and the voters of the Commonwealth are looking for ways to lower the exorbitant cost of public construction in the state, this ruling will undoubtedly increase those costs.

Attorney General Reilly Issues "Advisory Opinion" on Independent Contractors

On July 19, 2004, "An Act Further Regulating Public Construction in the Commonwealth" was signed into law (Chapter 193 of the Acts of 2004). Because the bill contained an emergency preamble, it became effective immediately. The Act replaces existing law regulating the use of independent contractors, and has important ramifications to workers' compensation cases.

According to the Advisory Opinion issued on January 13, 2006 by Attorney General Thomas Reilly's office: "Employers that improperly classify employees as independent contractors deprive these workers of proper Social Security contributions, workers' compensation insurance and other benefits, while also unfairly reducing employers' state and federal tax withholding, and related obligations. This practice disadvantages those businesses that bear higher costs in complying with the law. In this way, independent contractor misclassification undermines fair market competition.

"Massachusetts' legislature has manifested its interest in preventing independent contractor classification by amending the law, first enacted in 1990, which creates the presumption of employment in Massachusetts....The Independent Contractor Law excludes far more workers from independent contractor status than are disqualified under the traditional state and federal law tests, including the 20 Factors Test set forth in Internal Revenue Services ("IRS") Revenue Ruling 87-41, the Fair Labor Standards Act ("FLSA") and the Massachusetts common law. As a result, Massachusetts employers will need to reexamine many of their work relationships to ensure that they are complying with the law.***

"The Independent Contractor Law creates a presumption that a work arrangement is an employer-employee relationship unless the party receiving the services can overcome the legal presumption of employment by establishing that three factors are present. First, the worker must be free from the presumed employer's control and direction in performing the service, both under a contract and in fact. Second, the services provided by the worker must be outside the employer's usual course of business. And, third, the worker must be customarily engaged in an independent trade, occupation, profession, or business of the same type. Violations also carry a potential maximum penalty of up to \$50,000 per civil violation, as well as prison time and criminal fines for criminal violations. The Independent Contractor Law creates broad liability for both business entities and individuals, including corporate officers, and those with management responsibility over affected workers. The Attorney General views the misclassification of employees as a serious violation of state law. Where appropriate, the Attorney General will enforce aggressively the provisions of the Independent Contractor Law."

Claims adjusters, examiners, and underwriters need to familiarize themselves with these new provisions as a significant number of claims that previously might have been filed against the Workers' Compensation Trust Fund will now be covered under many employers' existing policies for other workers. The full text of this important Advisory Opinion can be found at the following link: <http://www.ago.state.ma.us/filelibrary/148BAAdvisory.pdf>

SJC Affirms Dismissal of "Unfair and Deceptive Business Practices" Claim

In a companion cases to *McCarty* above, the Supreme Judicial Court affirmed the dismissal of a claim for damages against that same insurer under G.L. c.93A, which prohibit unfair and deceptive business practices.

All seven Justices agreed: "In light of this comprehensive statutory and regulatory scheme that affords injured workers the opportunity to contest benefit determinations and payment practices, we conclude that employees who want to challenge the manner in which their workers' compensation benefits are calculated, and who believe that their employer or its insurer has engaged in questionable claims handling techniques, have an avenue for obtaining redress with respect to alleged misconduct. Given the breadth of the workers' compensation statute, it is evident that the Legislature intended employees to seek relief...through G.L. c.152, and not by way of action pursuant to C.L. c.93A. As such, the Superior Court had no subject matter jurisdiction over the plaintiffs' claims."

Recent Prosecutions by The Insurance Fraud Bureau of Massachusetts

ITEM: Timothy Hayes pleaded guilty in January 2006 to workers' compensation fraud and perjury. He was sentenced to serve one year in the House of Correction to be followed by two years probation. In July 2001, Hayes claimed a left shoulder injury as a result of a work-related injury while employed as a residential framer. He began receiving temporary total workers' compensation benefits of \$215 a week. Surgery was performed on the left shoulder in November 2001 and his benefits were reduced to partial disability benefits by the DIA. In December 2002, while still claiming partial disability benefits, Hayes was observed opening the hood of his motor vehicle, extending both arms over his head and putting oil in his car. Several months later an investigator videotaped Hayes working construction at a private home, climbing a ladder and working with a hammer. At a subsequent DIA hearing, Hayes testified that he had not worked nor earned any wages since his injury. At that hearing, DIA officials and Hayes watched the surveillance tape showing Hayes performing construction. Hayes stated under oath that it was not him in the video but a friend and that he had never worked at that location. The homeowner, contractor and accused friend later testified that it was Hayes on tape performing construction.

ITEM: Jonathan Farrow was indicted in December 2005 on charges of workers' compensation fraud and larceny. Farrow claimed a work-related injury alleging he bruised his chest when a piece of furniture shifted toward him while he was working as a furniture deliverer. As a result of this injury and based on Farrow's statements to the insurer, he received workers' compensation benefits. It is alleged that Farrow altered and submitted false medical records to his supervisor to support his failure to return to work. It is further alleged that these falsified medical records were, in fact, from an injury sustained by Farrow *four years earlier*. While collecting benefits, Farrow allegedly began working for the MBTA as a part-time bus driver where he continued to be employed.

ITEM: Thomas Fratantuono, Sr. pleaded guilty in November 2005 to workers' compensation insurance fraud and insurance fraud. He was sentenced to serve probation for two years and pay restitution of \$55,050. Fratantuono, who was a self-employed auto broker, suffered head injuries in a June 1999 auto accident and as a result reported that he suffered from cognitive difficulties, hearing loss and balance problems which prevented him from working after November 2000. From November 2000 through August 2003, Fratantuono collected \$699 per week in total disability benefits. In addition, Fratantuono collected

\$2,000 per month in total disability benefits under a private disability insurance policy. Investigation revealed that in 2001 and 2002, Fratantuono worked as a used car broker while continuing to collect disability payments. By concealing this employment, Fratantuono fraudulently collected more than \$55,000 in total disability benefits.

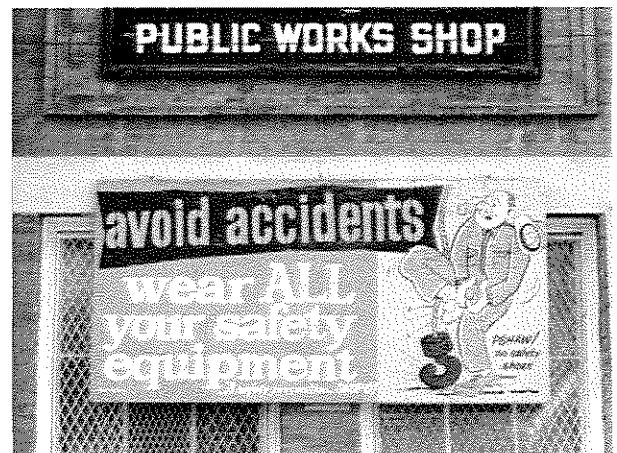
ITEM: Husband and wife Carlos Gomez and Mary Gildea were sentenced in October 2005 for paying employees "under-the-table" in order to evade millions of dollars in payroll taxes, workers' compensation insurance premiums and union health and welfare benefits. Gomez and Gildea pleaded guilty to all charges against them in March 2005. Gomez was sentenced to 12 months confinement followed by three years supervised release to include 12 months of home confinement with electronic monitoring. Gomez was also ordered to pay a \$50,000 fine and \$1,700 special assessment. Gildea was sentenced to 12 months confinement followed by two years supervised release to include 12 months of home confinement with electronic monitoring. She was also ordered to pay a \$50,000 fine and \$2,300 special assessment. Together they must pay \$4.7 million in restitution. The couple admitted to conspiring to defraud and to commit mail fraud and making false statements in records required by the Employee Retirement Income Security Act of 1974 (ERISA). The couple operated a construction service company known as Lanco Scaffolding Inc. which is in the business of supplying, erecting and dismantling scaffolding, primarily for use in construction projects. Gomez and Gildea paid many Lanco employees cash "under-the-table", concealing this cash payroll from the IRS. From October 1997 through September 2003, the pair paid Lanco workers at least \$2.9 million in unreported cash. Gomez and Gildea also provided their workers' compensation insurance companies with forged payroll records and forged "copies" of their tax returns, thus reporting even lower payroll figures to the insurers than the already fraudulent numbers reported to the IRS and evading more than \$1.9 million in workers' compensation premiums.

This information has been extracted from the IFB's website. For the full text on these items, go to www.ifb.org.

\$189K Recovery from Second Injury Fund; Over \$2.3 Million Currently Pending at WCTF

TKCK's Second Injury Fund Unit has recently recovered \$189,000 for a local employer, following the settlement of the 2001 injury of a long-time employee who had a long history of knee injuries at work. TKCK sub-mitted a reimbursement petition shortly after the employee was awarded §34A benefits by an Administrative Judge at the DIA. After convincing the Trust Fund that all the required elements had been met for reimbursement, the claims adjuster provided TKCK with payment records immediately after the case was settled. By working together closely, we were able to obtain a recovery of well over one-half the cost of the large Lump Sum Agreement in a very short period of time.

We have numerous other petitions presently being reviewed at the WCTF. Over \$1.7 million has been recovered in the last year on behalf of our clients.



This WW-II era safety poster is being preserved by the National Park Service here in the Charlestown Navy Yard to remind visitors and residents of the industrial heritage of this unique section of Boston. Its still good advice!

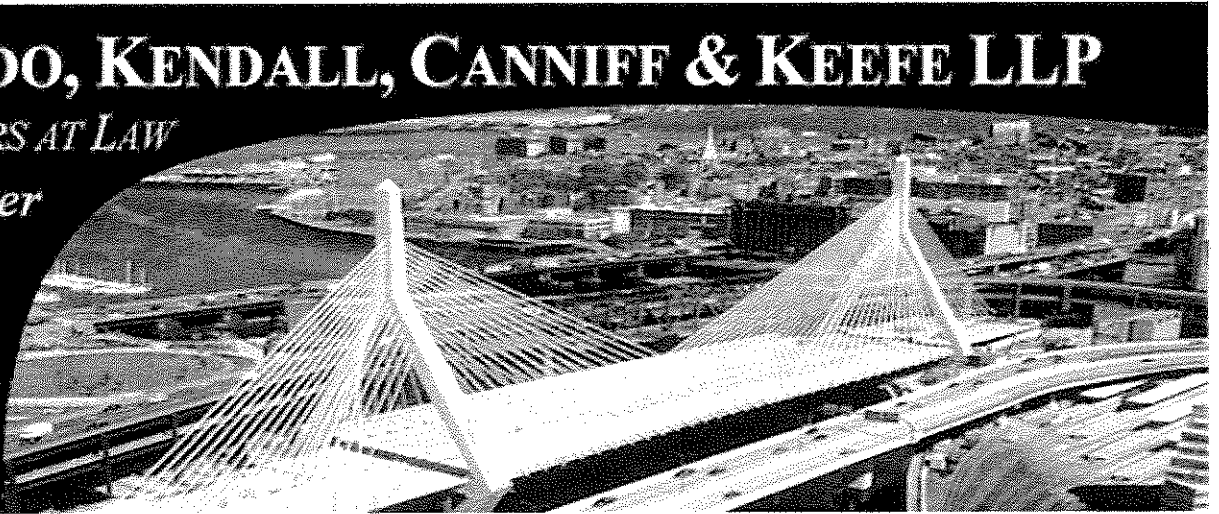
Bill Caples Joins TKCK Staff

Attorney William F. Caples has recently joined TKCK in an "of counsel" role. Bill has been a practicing attorney for 32 years and was previously in-house counsel for Liberty Mutual and Wausau insurance companies. We are pleased to have Bill as part of the TKCK team.

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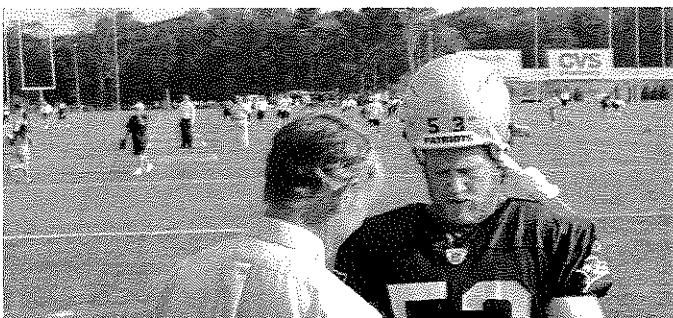
Summer 2006

TKCK's 4th Annual Seminar at Gillette Stadium Was "Hottest Event of the Year"

The local temperature at Gillette Stadium was well over 100 degrees when TKCK held its 4th annual Workers' Compensation Seminar on August 2, 2006. Approximately 175 clients and friends of TKCK attended the seminar and were treated to a guided tour of the stadium and an opportunity to watch the Patriots conduct an exciting training session on the field.

Featured guest speakers included Dr. Michael Mufson, who discussed "The Psychiatric Exam in Workers' Compensation Cases" and Dr. Robert R. Pennell, who demonstrated an actual orthopedic examination involving knee, shoulder, and low back injuries. John F. Keefe explained legal causation in psychiatric cases and Vincent Tentindo highlighted recent workers' compensation decisions from around the nation. John Harris gave a brief status report on Second Injury Fund recoveries. Senior Judge James LaMothe provided a detailed assessment of recent improvements at the DIA and a preview of his plans for the coming year. Judge LaMothe also discussed the upcoming reappointment for five additional judges whose terms will expire this summer.

The highlight of the seminar was an insider's explanation of how the New England Patriots compensate their injured players, as well as insight on how contracts are negotiated with professional athletes. Jack Mula, Chief Administrative Counsel for the Patriots, also allowed seminar attendees to try on his Super Bowl Ring and had some of the team's players sign autographs for those who stayed after the seminar to watch the team practice.



Patriot's Linebacker and Special Teams Captain Larry Izzo signs an autograph for Dr. Robert Pennell.

Paul F. Meleedy Joins TKCK

Attorney Paul F. Meleedy has recently joined TKCK as an Associate, after serving as Assistant Vice President, Claims Services, with Meadowbrook TPA Associates. He has 16 years of insurance experience with self-insured employers and self-insurance groups in New Hampshire and Massachusetts. Paul also holds the Associate in Risk Management (ARM) designation from the Insurance Institute of America. He received a B.A. from the University of Massachusetts in 1991 and earned his Juris Doctor from New England School of Law in 2002. Paul has been handling cases in both New Hampshire and Massachusetts, and will continue to do so for TKCK's clients.

Five DIA Judges Up For Reappointment; Judge Omar Hernandez' Nomination Remains in Limbo

The six-year term of five Administrative Judges at the DIA are set to expire this summer, and the reappointment process is now underway. The five judges are: AJ Lynn Brendemuehl; AJ John G. Preston; AJ Fred A. Taub; AJ Douglas A. McDonald; and AJ Diane L. Solomon. (There is also one vacancy on the six-member Reviewing Board that has been vacant for over two years.)

Senior Judge James LaMothe has posted an advertisement for new applicants to apply for these positions, and qualified applicants will be interviewed by the DIA's Judicial Nominating Committee. Those who are approved by a vote of that committee will be screened by the Workers' Compensation Advisory Committee and given a rating of "highly qualified," "qualified," or "not qualified" before those names are forwarded to the Governor for his final determination. The five current judges also go through this same process, and in effect, must compete with new candidates to secure re-nomination.

Once the Governor nominates an individual for each position, the elected 8-member Governor's Council will conduct a public interview of each nominee and then vote to confirm (or reject) the Governor's nominee.

(Continued on Page 2)

Two months ago, the Governor nominated Douglas A. Bean and Omar Hernandez for new six-year terms. Bean was unanimously confirmed by the Council but the Hernandez nomination ran into difficulty when it was learned that several Governor's Council members were planning to defeat his reappointment for no apparent reason. Hernandez' nomination was withdrawn, and it is expected that the Governor will resubmit his name to the Council later this year.

Interested parties who wish to express an opinion on any nominee can write to either Senior Judge James L. LaMothe, Jr. at the Department of Industrial Accidents, 600 Washington Street, Boston, MA 02111, or to Mark D. Nielsen, Governor's Chief Legal Counsel, Room 271, The State House, Boston, MA 02133.

Elaine Gravante Admitted to NH Bar

Attorney Elaine Gravante was recently admitted to the practice of law in New Hampshire. She is a 1996 graduate of Suffolk Law School and has been with TKCK since 2002. In addition to her legal duties, Elaine ensures that the firm meets its commitments to remain AIG-compliant, and is indispensable in preparing PowerPoint slides for TKCK seminars.

TKCK's Aaron LaRue Off to Law School

Versatile paralegal Aaron LaRue has been accepted at the Thomas Cooley Law School and relocated to Lansing, Michigan, this month. The firm celebrated this milestone with a farewell party at a local restaurant and gave him a gift certificate to Target, one of our clients that offers necessary survival items that every law student needs for a new apartment. We wish Aaron the best of luck during the challenging three years ahead. He is being replaced by Ned Dunleavy, an experienced paralegal who worked at another law firm in Boston. TKCK is glad to have Ned aboard.



Children of TKCK Seminar attendees got lucky seeking autographs from several Patriot players during practice.



A view from the TKCK Seminar of the closed Patriot's practice shows Quarterback Tom Brady getting to work.

MA Appeals Court: No statute of Limitations for Pre-1991 "Second Injuries"

The Massachusetts Court of Appeals has ruled that insurers are not barred by a statute of limitations for reimbursement from the Second Injury Fund for injuries occurring prior to December 23, 1991.

The Workers' Compensation Trust Fund had appealed a 2003 decision by an Administrative Judge of the Industrial Accident Board which awarded reimbursement to Travelers Insurance Company for a petition filed in December 1998, based on an injury in September 1989 that was eventually settled by lump sum agreement in June 1995.

The Trust Fund argued that the Workers' Compensation Reform Act of 1991 added a "rolling" two-year statute of limitations on such reimbursement petitions and that the legislative amendment should be applied retroactively to all such petitions, regardless of the date of injury. The Appeals Court ruled that there was no ambiguity in the legislative changes and the decision of the Industrial Accident Board "is certainly reasonable, and warrants deference."

The decision cited an earlier decision of the Industrial Accident Board that dealt with this "case of first impression" by concluding "...we agree with the board's assessment of the reasoning in *Walsh v. Bertolino Beef Co.* that to apply the trust fund's reading of the Reform Act 'would render the Legislature's prospective characterization of [the amendments designated in §106] as utterly meaningless.'"

The author of the earlier *Walsh* decision, retired Judge John P. Harris, who now specializes in Second Injury Fund recoveries for TKCK, commented on the Appeals Court ruling: "This is an important outcome for employers in Massachusetts who have been financing the Second Injury Fund via assessments on its workers' comp premiums. TKCK encourages all of its clients to comply with the ADA law by hiring disabled workers and those who have experienced workplace injuries with previous employers. Most of our clients also offer modified duty to their own workers if they become injured on the job."

"When those good personnel practices occasionally result in a substantially greater disability and higher compensation costs, it is only fair for that insurer to share those extra costs with all of the insurers in the state, as the Legislature intended, from the money that employers have been mandated to contribute each year."

If you want to have TKCK discuss an issue or topic in the e-Newsletter, please contact Vincent Tentindo or John Harris via email: vmt@tkcklaw.com or jph@tkcklaw.com

DIA Reviewing Board:

**Trust Fund Must Pay Interest
On Delayed §37 Recoveries**

On June 20, 2006, the Reviewing Board reversed its prior holding in *Carmilia v. General Electric* and concluded that "sovereign immunity" does not bar interest awards against the Workers' Compensation Trust Fund for Second Injury Fund recoveries.

While the doctrine of "sovereign immunity" typically is a bar to claims for interest against government entities, the specific language of the Workers' Compensation Act in §50 states: "Whenever payments of any kind are not made within sixty days of being claimed by an employee, dependent or other party, and an order or decision requires that such payments be made, interest at the rate of ten percent per annum...shall be required by such order or decision."

CNA Insurance Company argued that the statutory liability under §37 fits within the "implied contract exception" to sovereign immunity. In the case at issue, the Commonwealth was held liable to pay money to an insurance company by virtue of the State's breach of its own expressly acknowledged statutory obligations and the insurer's actions in conformity with the statutory scheme for "second injuries" to its detriment: "By analogy...the employer (on its own behalf and that of its insurer) participates in the statutory program when it hires a previously injured employee and agrees to assume an increased exposure if there is an industrial accident involving the previously injured employee in exchange for the §37 claim for reimbursement if the specified conditions are met."

The Reviewing Board added the following commentary: "The imposition of §50 interest serves the policy of encouraging early resolution and settlement. It only makes sense that there should be financial motivation for the Trust Fund to promptly pay meritorious §37 petitions, rather than relying on the prerequisite of a hearing decision. The benefit to employers from the §37 reimbursement – the appropriate downward adjustment to experience modification – can be entirely lost when petitions languish in the system for years."

While the payment of interest applies only to those petitions actually argued before a judge at Conference or Hearing, it will probably result in the Trust Fund making more reasonable and quicker offers to settle §37 claims to avoid interest awards. (See *Theresa Morales and Lutheran Home of Brockton/CNA Insurance Company v. Workers' Compensation Trust Fund*.)

**Concurrent Wages Must be Paid
Even If Employer is Uninsured**

Mike Sellers sustained devastating injuries to his spinal cord, resulting in quadriplegia, when he was crushed by a falling tree limb while working for an uninsured tree service. There was no dispute that he became permanently, totally disabled from that accident. At the time of his injury, Mike was employed by another company (SMC) which was insured by Liberty Mutual Insurance Company and claimed weekly compensation based on wages from both jobs.

The Trust Fund argued that it was liable only for benefits based on his tree service wages, contending that "because the employee had only one 'insured' employer, SMC, the concurrent employer provision of §1(1) is inapplicable." An administrative judge issued a decision awarding compensation based on both the uninsured employer and the insured concurrent employer. The Reviewing Board upheld that determination by clarifying the intent of the provisions of G.L. c.152 §65(2)(e): At the time this provision was initially enacted in 1935, workers compensation insurance was not mandatory in Massachusetts, hence the requirement that the second job be with "an insured employer." Coverage became mandatory in 1943, but the concurrent employer provision was not revised to be compatible with that new scenario.

The Reviewing Board states: "We seen no policy or rationale to justify an interpretation of §1(1) which would deprive the employee the benefit of his concurrent earnings simply because one of his employers failed to provide the workers' compensation coverage required by law. Because, on the facts of this case, we interpret "insured employer" in §1(1) to mean an employer legally required to carry workers' compensation insurance, we affirm the decision...."

This ruling does not change the outcome of other cases involving self-employment or out-of-state employment, which are not eligible for consideration as concurrent employment under c. 152. (See *Michael Sellers v. John Havlin Tree Service v. Workers' Compensation Trust Fund*.)



Patriot CB Ellis Hobbs takes time to sign an autograph.

TKCK Client Services Reminder

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Appeals to Reviewing Board/Appeals Court – John J. Canniff
jjc@tkcklaw.com

Second Injury Fund recoveries – John P. Harris
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New Hampshire Workers' Compensation – Paul F. Meleedy
pfm@tkcklaw.com

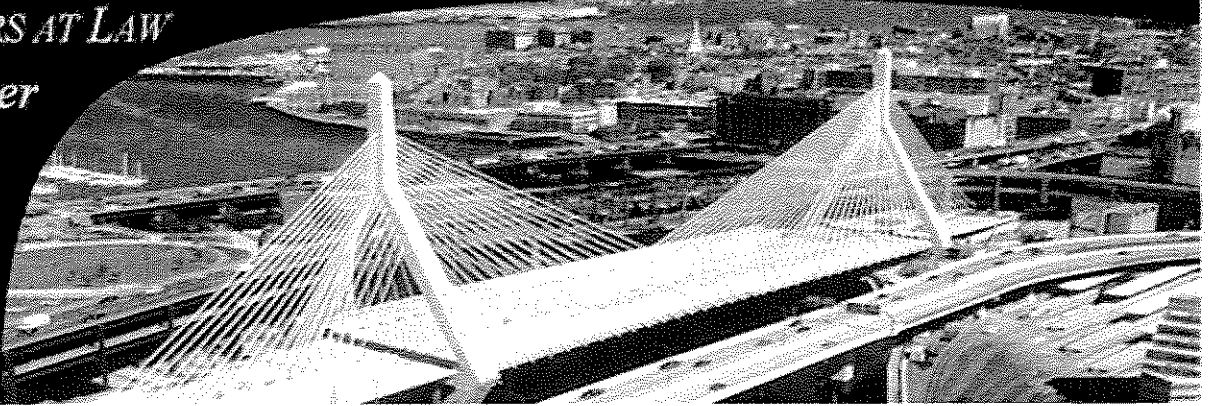
Medical malpractice/subrogation – Vincent M. Tentindo
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Winter 2007

ELECTION BRINGING BIG CHANGES AT DIA

The November 2006 election is already resulting in many changes at the Department of Industrial Accidents. In the last few weeks of his administration, Governor Mitt Romney nominated DIA Senior Judge James Lamothe to a lifetime appointment as Associate Justice at the Peabody District Court. Lamothe, who had built a reputation for candor and cooperation with the members of the Governor's Council over the past two years and was highly regarded as an Administrative Judge in the Lawrence Regional Office for twelve years, was unanimously confirmed by the Council and was sworn into his new position on December 19, 2006. Judge Lamothe now joins former Senior Judges Joseph Jennings and Daniel O'Shea in the District Court system, along with former Administrative Judges James McGuinness, Jacques Leroi, and Barbara Pearson. Because the incoming Governor, Deval Patrick, will be responsible for selecting a new Senior Judge, that position is being filled on an interim basis by Administrative Law Judge William J. McCarthy, who has been serving on the Reviewing Board at the DIA since the 1980s.

Governor Patrick has already appointed former Democratic state representative Suzanne Bump to serve as Secretary of Labor and Business, which has responsibility for oversight of the Department of Industrial Accidents. Secretary Bump has extensive familiarity with the workers' compensation system and was a key player in the run-up to the Workers' Compensation Reform Act of 1991.

A second appointment has also been made that will impact on the DIA. Effective January 29, 2007, George Noel was named as the new Director of the Department of Labor. Noel was Business Manager/Financial Secretary of Local 1505 IBEW, representing workers at Raytheon. In his new role, Noel will oversee the Department of Industrial Accidents, Division of Occupational Safety, Board of Conciliation and Arbitration, Labor Relations Commission, and the Joint Labor-Management Committee. In accepting his appointment, Noel said "I am humbled and honored that our governor has given me the opportunity to help him restore economic justice to the Commonwealth's workers and their families."

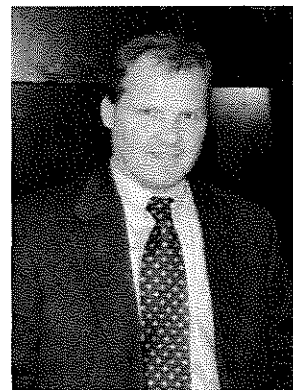
DIA Commissioner Henry A. Swiniarski resigned from that position effective February 2, 2007 to become Treasurer of the Massachusetts School Building Authority. His successor is Paul V. Buckley, a former District Court Judge who retired from that position in February 2006 and then worked in the Bristol County District Attorney's office until Governor Deval Patrick appointed him in late February.

Since Patrick will be the first Democratic Governor in 16 years, it is expected that he will make wholesale changes in management

personnel at the DIA within a short period of time. Because there have been no significant changes to Chapter 152 since the 1991 Reform Act was passed, it is also likely that a number of legislative amendments that have been debated, but not approved, over the past few years will have the support of the incoming administration.

Mark Kelly, Darren Goldberg Named as TKCK Partners

The firm is pleased to announce that Mark J. Kelly and Darren I. Goldberg have been promoted to Partners of the firm, effective January 1, 2007. Both Mark and Darren have been with the firm as Associates since the founding of TKCK in 2000.



Mark is a 1984 graduate of Boston College and earned his *Juris Doctor* from New England School of Law in 1994. Prior to joining TKCK, Mark served as Assistant General Counsel for the Commonwealth of Massachusetts at the Department of Industrial Accidents, where he defended claims against the Trust Fund for uninsured employers and for Second Injury Fund reimbursements.

Darren graduated from Pennsylvania State University in 1993 and earned his law degree from the New England School of Law in 1996. He served as a law clerk for the City of Boston's Workers' Compensation Department while attending law school, and then was an Associate at Peabody & Arnold from 1996 to 2000, when he joined TKCK as one of its original staff.

Judge Hernandez Confirmed by Council for 6-Year Term

After a failed attempt by members of the workers' compensation claimants' bar to block his reappointment, the nomination of Omar Hernandez was resubmitted by Governor Romney to the Governors' Council, which confirmed him for a new 6-year term on October 25, 2006. When it appeared that several members of the Council were going to vote against his reappointment, Romney withdrew the nomination back in June 2006. While similar tactics had been successful in past years, this was the first time that members of the insurance defense bar and other groups organized support for Hernandez and wrote dozens of letters on his behalf. TKCK published a "Special Edition" of this *E-Newsletter* to alert the insurance industry to that behind-the-scenes maneuver.

Five other Administrative Judges were confirmed for additional six-year terms within the past few months. They include Lynn Brendemuehl (Fall River), Fred Taub (Boston), Douglas McDonald (Boston), Diane Solomon (Boston) and Roger Lewenberg (Boston/Fall River). In the new year of 2007, only one member of the Board has a term that will be expiring. AJ William Constantino (Worcester) has announced that he will be retiring when his term ends in June 2007. Incoming Governor Patrick will be able to fill that spot, as well as the single vacancy that has existed on the six-member Reviewing Board for over two years.

Tentindo, Harris Featured Presenters At Mass Municipal Association's 2007 Annual Convention in Boston

Officials from several dozen cities and towns in Massachusetts attended a presentation by Vincent Tentindo and John Harris of TKCK, entitled "The Most Challenging Aspects of Workers' Compensation" on Friday, January 12, 2007 at the John B. Hynes Convention Center in Boston. Over 1100 members of that Association attended the 3-day convention which featured several national figures who spoke, as well as an address by newly-elected Governor Deval Patrick. The program included six breakout topics, including the presentation by TKCK, entitled "Handling Your Most Difficult Workers' Compensation Cases."

TKCK Opens Office in Nashua, New Hampshire

On November 15, 2006, TKCK opened its new office at 154 Broad Street, Suite 1524, in Nashua, New Hampshire. That location will be the base of operations for our expanding practice of Workers' Compensation in New Hampshire, which will be handled by Attorneys Paul Meleedy and Elaine Gravante, both of whom are admitted to practice in the Granite State. The phone number for that office is 877-279-5743. All mail should continue to be sent to the Boston office in the Charlestown Navy Yard.

TKCK Plans "Claims School" For clients at Charlestown Office

TKCK is planning to conduct a series of half-day "Claims Schools" for our client and friends, beginning in a few weeks. The sessions will be held in our Conference Room in Charlestown on topics that will help adjusters better prepare cases for legal defense. A variety of topics will be covered, including identification of subrogation potential, Second Injury Fund recoveries, and effective tools to uncover fraudulent claims. For those who would like to attend, send an email to Vincent Tentindo at vmt@tkcklaw.com.

Joseph Durant Joins TKCK

Noted insurance defense attorney Joseph J. Durant joined the staff of TKCK on February 5, 2007. He previously was a partner in the firm of Kaufmann & Durant in Andover, MA, where he handled cases for Liberty Mutual since 1992.

Joe has a B.S. degree in History and Political Science, *cum laude*, from Boston College and earned his *Juris Doctor* from Suffolk University Law School in 1980. He has been a faculty member for a variety of training programs and has successfully prosecuted a number of fraud cases. Mr. Durant has been a member of the Board of Selectmen in Hudson, MA, for over twenty years and is active in community affairs. Joe will be primarily responsible for handling cases in the Springfield and Worcester regional offices for TKCK.



"Does Illegal Immigration Affect your Workers' Compensation Costs?"

In a 12-page article in the Fall 2006 issue of *The Journal of Workers' Compensation*, Vincent Tentindo and John Harris provided a comprehensive analysis of how this emerging national issue has increased costs to employers who provide mandatory workers' compensation coverage to their employees. The article includes details about the rising cost of claims paid out by the Workers' Compensation Trust Fund for injuries to workers whose employers do not purchase such coverage, which are paid by an assessment levied on those employers who do purchase such coverage.

The article discussed recent court cases which establish that immigrants are entitled to the full range of workers' comp benefits, regardless of their legal status and whether or not their employers are in compliance with all the applicable laws of the state. The authors provided a case study in a particularly dangerous occupation – hardwood floor refinishing – where a number of fatal accidents have recently occurred and what steps are being taken to bring those workers and their employers into compliance with safety standards and mandatory insurance. A copy of that article will soon be added to the TKCK website, where it can be downloaded to your computer.

W.C. Seminar Held on March 13

The Council on Education in Management hosted another one-day seminar entitled "The Complete Survival Guide to Massachusetts Workers' Compensation" in Woburn MA on March 13, 2007. Vincent Tentindo and John Harris conducted the seminar, with presentations by Erika Soong and Paul Meleedy. The program was eligible for professional Continuing Education Unit credits to those attending. TKCK and the Council expect to hold another seminar in early Summer 2007.

TKCK Client Services Reminder

If you have a question concerning any of the following aspects of Workers' Compensation law, please contact the TKCK specialist identified below for a quick response:

- Appeals to Reviewing Board/Appeals Court – John J. Canniff, jjc@tkcklaw.com
- Second Injury Fund recoveries – John P. Harris, jph@tkcklaw.com
- New Hampshire Workers' Compensation – Paul F. Meleedy, pfm@tkcklaw.com
- Medical malpractice/subrogation – Vincent M. Tentindo, vmt@tkcklaw.com

MA Workers' Compensation Insurers File for 13.4% Rate Decrease

The Workers' Compensation Rating and Inspection Bureau of Massachusetts (WCRIB) recently submitted to the state Division of Insurance a proposed average rate decrease of 13.4 percent for workers' compensation insurance effective September 1, 2007.

If the WCRIB's filing is approved, workers' compensation rates in Massachusetts would be 64 percent less than they were in 1991 when the state's workers' compensation reform law was passed, according to WCRIB, which is the licensed rating organization that files rates with the Division of Insurance on behalf of insurers writing workers' compensation coverage in Massachusetts.

Rates can go down because workplace injury claims have, according to Paul Meagher, president of the WCRIB. "From the combined efforts of insurers, employers, workers and regulators, the frequency of workplace injuries has continued to decline in Massachusetts. As a result, overall costs for both indemnity and medical claims in Massachusetts have declined in spite of continual increases in average claim severity and medical cost inflation."

Meagher credited insurers for contributing to the decrease in claim frequency "by working with employers to provide safe work environments for employees." However, Meagher cautioned that while the proposed decrease is good news, unchecked rising medical and pharmaceutical costs could erode the gains and lead to future rate inadequacy.

He cited another market concern. Currently the Assigned Risk Pool, which underwrites employers who cannot obtain voluntary coverage, is the second largest insurer in the state with 15 percent of the market.

Meagher also noted that the future of the federal Terrorism Risk Insurance Extension Act of 2005 (TRIEA), which is scheduled to expire on December 31, 2007, is critical to maintaining stability in the workers' compensation voluntary market.

From Insurance Journal Online, March 2, 2007

Reviewing Board Orders Penalty for Failure to Pay COLA Increases

In a Decision issued on December 5, 2006, the Reviewing Board of the DIA reversed an Administrative Judge's ruling that an §8(5) penalty was not due to an employee when a self-insurer unilaterally reduced the amount of his COLA benefits.

In the case of *John M. Camara v. DPW Mass. Highway Dept.*, Mr. Camara injured his low back in October 1987 and returned to work four years later in a modified duty position for approximately four months. He then left work due to pain from that injury, and was placed on §34 benefits based on his 1992 earnings. He then returned to work again from November 1992 until February 1994, when he was placed on §35 benefits by a §19 Agreement.

The employee was later awarded §34A benefits from March

1999 forward, and the self-insurer correctly began making COLA increases based on the multiplier applicable for a 1987 date of injury. In 2002, the self-insurer unilaterally reduced those COLA benefits by adopting the multiplier for 1994, the year when the employee stopped working for the final time. The employee filed a claim to resume COLA benefits at the higher rate and also sought a penalty for an illegal reduction of benefits. The Administrative Judge reinstated the COLA to the correct level, but denied the penalty request based on the self-insurer's argument that COLA is not "compensation" and thus is not within the scope of §8(5)'s penalty provision regarding "additional compensation" later being ordered.

The Reviewing Board adopted the reasoning of an earlier case, and made "note that §8(5)'s pairing of the failure to make 'any payments required under this chapter' with the remedy of 'additional compensation' ordered, necessarily brings COLA within its coverage. COLA is clearly a 'payment required under this chapter'." The penalty in this case was equal to 20% of the back COLA payments that were ordered. The employee's attorney was awarded a fee of \$1,407.15 for prevailing on his appeal.

DIA Reports Incident of "Identity Theft" occurred with Contract Worker

The Department of Industrial Accidents (DIA) recently became aware that a former contract employee used workers' compensation claimants' personal identifiers (including Social Security numbers) with the apparent intent of committing criminal or fraudulent acts. The incident is under investigation by law enforcement authorities. The former contract employee has been terminated and arrested and will be prosecuted.

The DIA deeply regrets that this incident occurred and has taken appropriate steps to prevent this from happening again.

At this stage of the investigation, we have determined that up to 1,200 names may have been compromised. All 1,200 individuals potentially impacted by this situation will be sent notice via U.S. mail today. It is important to note that at this time we are aware of only three individuals whose personal identifying information was allegedly used by the perpetrator to obtain credit by fraudulent means. There is currently no evidence to indicate that any other claimants within the DIA database were affected.

As a government agency serving the people of the Commonwealth of Massachusetts, we take our responsibility to protect our data very seriously. As such, a number of internal changes have been implemented to minimize the exposure of our data and in particular the personal identifiers of workers' compensation claimants.

The DIA extends its sincerest apologies to anyone who may have been impacted or inconvenienced by this fraudulent act. If you have any questions regarding this matter, please contact the Department of Industrial Accidents, Monday - Friday, 9:00 AM - 5:00 PM at 1-800-323-3249 ext. 560 (toll free inside MA) or at 617-727-4900 ext. 560.

Excerpted from DIA official website, January 31, 2007

August 3, 2008

Immigrants Deported, by U.S. Hospitals

By DEBORAH SONTAG

JOLOMCÚ, Guatemala — High in the hills of Guatemala, shut inside the one-room house where he spends day and night on a twin bed beneath a seriously outdated calendar, Luis Alberto Jiménez has no idea of the legal battle that swirls around him in the lowlands of Florida.

Shooing away flies and beaming at the tiny, toothless elderly mother who is his sole caregiver, Mr. Jiménez, a knit cap pulled tightly on his head, remains cheerily oblivious that he has come to represent the collision of two deeply flawed American systems, immigration and health care.

Eight years ago, Mr. Jiménez, 35, an illegal immigrant working as a gardener in Stuart, Fla., suffered devastating injuries in a car crash with a drunken Floridian. A community hospital saved his life, twice, and, after failing to find a rehabilitation center willing to accept an uninsured patient, kept him as a ward for years at a cost of \$1.5 million.

What happened next set the stage for a continuing legal battle with nationwide repercussions: Mr. Jiménez was deported — not by the federal government but by the hospital, Martin Memorial. After winning a state court order that would later be declared invalid, Martin Memorial leased an air ambulance for \$30,000 and “forcibly returned him to his home country,” as one hospital administrator described it.

Since being hoisted in his wheelchair up a steep slope to his remote home, Mr. Jiménez, who sustained a severe traumatic brain injury, has received no medical care or medication — just Alka-Seltzer and prayer, his 72-year-old mother said. Over the last year, his condition has deteriorated with routine violent seizures, each characterized by a fall, protracted convulsions, a loud gurgling, the vomiting of blood and, finally, a collapse into unconsciousness.

“Every time, he loses a little more of himself,” his mother, Petrona Gervacio Gaspar, said in Kanjobal, the Indian dialect that she speaks with an otherworldly squeak.

Mr. Jiménez’s benchmark case exposes a little-known but apparently widespread practice. Many American hospitals are taking it upon themselves to repatriate seriously injured or ill immigrants because they cannot find nursing homes willing to accept them without insurance. Medicaid does not cover long-term care for illegal immigrants, or for newly arrived legal immigrants, creating a quandary for hospitals, which are obligated by federal regulation to arrange post-hospital care for patients who need it.

American immigration authorities play no role in these private repatriations, carried out by ambulance, air ambulance and commercial plane. Most hospitals say that they do not conduct cross-border transfers until patients are medically stable and that they arrange to deliver them into a physician’s care in their homeland. But the hospitals are operating in a void, without governmental assistance or oversight, leaving ample room

for legal and ethical transgressions on both sides of the border.

Indeed, some advocates for immigrants see these repatriations as a kind of international patient dumping, with ambulances taking patients in the wrong direction, away from first-world hospitals to less-adequate care, if any.

“Repatriation is pretty much a death sentence in some of these cases,” said Dr. Steven Larson, an expert on migrant health and an emergency room physician at the Hospital of the University of Pennsylvania. “I’ve seen patients bundled onto the plane and out of the country, and once that person is out of sight, he’s out of mind.”

Hospital administrators view these cases as costly, burdensome patient transfers that force them to shoulder responsibility for the dysfunctional immigration and health-care systems. In many cases, they say, the only alternative to repatriations is keeping patients indefinitely in acute-care hospitals.

“What that does for us, it puts a strain on our system, where we’re unable to provide adequate care for our own citizens,” said Alan B. Kelly, vice president of Scottsdale Healthcare in Arizona. “A full bed is a full bed.”

Medical repatriations are happening with varying frequency, and varying degrees of patient consent, from state to state and hospital to hospital. No government agency or advocacy group keeps track of these cases, and it is difficult to quantify them.

A few hospitals and consulates offered statistics that provide snapshots of the phenomenon: some 96 immigrants a year repatriated by St. Joseph’s Hospital in Phoenix; 6 to 8 patients a year flown to their homelands from Broward General Medical Center in Fort Lauderdale, Fla.; 10 returned to Honduras from Chicago hospitals since early 2007; some 87 medical cases involving Mexican immigrants — and 265 involving people injured crossing the border — handled by the Mexican consulate in San Diego last year, most but not all of which ended in repatriation.

Over all, there is enough traffic to sustain at least one repatriation company, founded six years ago to service this niche — MexCare, based in California but operating nationwide with a “network of 28 hospitals and treatment centers” in Latin America. It bills itself as “an alternative choice for the care of the unfunded Latin American nationals,” promising “significant saving to U.S. hospitals” seeking “to alleviate the financial burden of unpaid services.”

Many hospitals engage in repatriations of seriously injured and ill immigrants only as a last resort. “We’ve done flights to Lithuania, Poland, Honduras, Guatemala and Mexico,” said Cara Pacione, director of social work at Mount Sinai Hospital in Chicago. “But out of about a dozen cases a year, we probably fly only a couple back.”

Other hospitals are more aggressive, routinely sending uninsured immigrants, both legal and illegal, back to their homelands. One Tucson hospital even tried to fly an American citizen, a sick baby whose parents were illegal immigrants, to Mexico last year; the police, summoned by a lawyer to the airport, blocked the flight. “It was horrendous,” the mother said.

Sister Margaret McBride, vice president for mission services at St. Joseph's in Phoenix, which is part of Catholic Healthcare West, said families were rarely happy about the hospital's decision to repatriate their relatives. But, she added, "We don't require consent from the family."

In a case this spring that outraged Phoenix's Hispanic community, St. Joseph's planned to send a comatose, uninsured legal immigrant back to Honduras, until community leaders got lawyers involved. While they were negotiating with the hospital, the patient, Sonia del Cid Iscoa, 34, who has been in the United States for half her life and has seven American-born children, came out of her coma. She is now back in her Phoenix home.

"I can think of three different scenarios that would have led to a fatal outcome if they had moved her," John M. Curtin, her lawyer, said. "The good outcome today is due to the treatment that the hospital provided — reluctantly, and, sadly enough, only in response to legal and public pressure."

Unlike Ms. Iscoa and Mr. Jiménez, most uninsured immigrant patients in repatriation cases do not have advocates fighting for them, and they are quietly returned to their home countries. Sometimes, their families accept that fate because they are told they have no options; sometimes they are grateful to the hospital for paying their fare home, given that other hospitals leave it to relatives or consulates to assume responsibility for the patients.

Mr. Jiménez's case is apparently the first to test the legality of cross-border patient transfers that are undertaken without the consent of the patients or their guardians — and the liability of the hospitals who undertake them.

"We're the rhesus monkey on this issue," said Scott Samples, a spokesman for Martin Memorial.

A Life-Changing Accident

Mr. Jiménez's journey north was propelled by the usual migrant's dreams. When he pledged thousands of dollars to pay the smuggler who delivered him to the United States, he envisioned years of labor on the lawns of affluent America and then a payoff: the means to buy land of his own, to cultivate his own garden, back in Guatemala.

But fate — in the person of Donald Flewellen, a pipe welder with a drug problem and a long criminal record — intervened. At lunchtime on Feb. 28, 2000, Mr. Flewellen was loitering in the parking lot of a Publix supermarket in Palm Beach Gardens, Fla., when the employees of an irrigation company ran inside, leaving the keys in their van. Seizing the moment, Mr. Flewellen, a thorn in the side of local prosecutors with at least 14 arrests, jumped into the van and drove off.

In the next few hours, Mr. Flewellen consumed enough alcohol to produce a blood-alcohol level four times higher than the legal limit. But drive he did, along the back roads that connect the affluent Treasure Coast to the agricultural interior where Guatemalan Mayan immigrants have settled in a place, coincidentally, called Indiantown.

About 4 p.m., Mr. Flewellen was heading east on a rural road just as Mr. Jiménez and three compatriots were returning home from a day of landscaping. His stolen van and their 1988 Chevrolet Beretta crashed head-on,

instantly killing two of the Guatemalans and severely injuring the driver and Mr. Jiménez, a back-seat passenger.

Identified first as John Doe, Mr. Jiménez arrived by ambulance at Martin Memorial, a not-for-profit hospital on the banks of the St. Lucie River in Stuart. He was unconscious and in shock from extensive bleeding, with two broken thigh bones, a broken arm, multiple internal injuries, a terribly lacerated face and a severe head injury. A doctor noted his prognosis as "poor."

But Mr. Jiménez, after intensive surgical and medical intervention, survived. "He was no longer Luis; he was another person," Montejo Gaspar Montejo, his cousin by marriage, said, describing a previously husky and industrious laborer who was also a soccer enthusiast. "He didn't talk. He didn't understand anything. He stayed curled up in a ball. But he was alive."

During that time, Martin Memorial asked Michael R. Banks, a local lawyer who specializes in estate planning, to set up a guardianship for Mr. Jiménez. "I said, 'Sure, what can come of such a case?'" Mr. Banks said. "Then it took on a life of its own. They probably regret they ever called me."

Mr. Jiménez, whose common-law wife and two children remained in Guatemala, had been living for just under a year with Mr. Gaspar's family. Mr. Gaspar, who works in golf-course maintenance, agreed to serve as guardian.

At first, things were amicable. In the summer of 2000, Mr. Jiménez was transferred to a nursing home in Stuart, which may have accepted him because an insurance payout was possible.

Mr. Flewellen, who eventually pleaded guilty to D.U.I. manslaughter, D.U.I. injury and grand theft auto, was not insured. But the Guatemalan families sought to hold the irrigation company liable since its employees left the keys in the car. Their lawsuit ultimately failed.

In the nursing home, Mr. Jiménez began wasting away. His relatives grew anxious. Then, Robert L. Lord Jr., Martin Memorial's vice president of legal services, said, "Mr. Jiménez was put back on our doorstep."

He arrived by ambulance, this time emaciated and suffering from ulcerous bed sores so deep that the tendons behind his knees were exposed. With infection raging, "the question to be answered is if the patient's condition is terminal," a doctor wrote in his file.

Again, Martin Memorial's doctors provided life-saving care. Hospitals are mandated to treat and stabilize anyone suffering from an emergency medical condition, and the federal government does provide emergency Medicaid coverage for illegal and new immigrants.

But hospitals say that emergency Medicaid covers only a small fraction of those expenses: \$80,000 in Mr. Jiménez's case, according to court papers.

Mr. Jiménez remained in a vegetative state, coiled in a fetal position, for "one year, two months and 15 days," Mr. Gaspar said with precision.

Stunning his relatives and medical officials, though, Mr. Jiménez gradually woke up and started interacting

with the world. "One day," Mr. Gaspar said in Spanish, "we arrived for a visit, and he said to me, 'You are Montejo.' "

Not long afterward, the battle began between Martin Memorial and Mr. Gaspar, a reserved man whose Indiantown living room is decorated with a "We Love America" clock, a beach towel from the ancient city of Tikal and a hammered metal image of the Virgin Mary.

A Hospital's Dilemma

The average stay at Martin Memorial, a relatively tranquil hospital which features a palm frond design in its gleaming lobby floor and white-coiffed volunteers in its gift shop, is 4.1 days and costs \$8,188. Patients rarely linger.

Those like Mr. Jiménez who outstay their welcome are an oddity but not an anomaly. Mr. Jiménez had a roommate from Jamaica, a diabetic who lost both legs. Martin Memorial eventually flew him back to his native country, too.

In addition to trauma patients, there are uninsured immigrants with serious health problems. "In our emergency room, we don't turn anyone away," said Carol Plato Nicosia, the director of corporate business services. "The real problem is if we find an underlying problem, and now we have six of them — six patients who showed up in renal failure and that we are now seeing three times a week for dialysis."

One of the six, she said, voluntarily returned to Guatemala after receiving a poor prognosis. But she showed up at Martin Memorial again after her relatives insisted that she undertake the trek over the borders a second time because she could not get treatment in Guatemala, Ms. Plato Nicosia said.

"I don't want to sound heartless," Ms. Plato Nicosia said. "A community hospital is going to give care. But is it the right thing? We have a lot of American citizens who need our help. We only make about 3 percent over our bottom line if we're lucky. We need to make capital improvements and do things for our community."

Martin Memorial reported a total margin of 3.6 percent over its bottom line last year and 6 percent in 2006. According to the most recent statewide data, the nonprofit medical center also reported assets of \$270.6 million in 2006, with its senior executives earning more than \$4 million in salaries and benefits.

Tax-exempt hospitals are expected to dedicate an unspecified part of their services to charity cases, and Martin Memorial devoted \$23.9 million in 2006, about 3 percent, which was average for Florida, according to state data.

Mr. Jiménez was a very expensive charity case. In cases like his, where patients need long-term care, hospitals are not allowed to discharge them to the streets. Federal regulations require them — if they receive Medicare payments, and most hospitals do — to transfer or refer patients to "appropriate" post-hospital care.

But in most states, the government does not finance post-hospital care for illegal immigrants, for temporary legal immigrants or for legal residents with less than five years in the United States. (California and New York City are notable exceptions; Medi-Cal, the state's Medicaid program, spends \$20 million a year on long-term

care for illegal immigrants, as does the Health and Hospitals Corporation of New York City.)

Martin Memorial's lawyer, Mr. Lord, said hospitals should not be forced to assume financial and legal responsibility for these cases. "It should be a governmental burden," he said, "or the government should step in and otherwise exercise its authority for deportation or whatever it wants to do."

In Mr. Jiménez's case, the hospital's doctors determined that appropriate post-hospital care meant traumatic brain injury rehabilitation. Much to the surprise of the hospital staff, Mr. Jiménez had regained cognitive function to about the level of a fourth-grade child.

Hospital discharge planners searched to no avail for a rehabilitation program or nursing home. "Unable to take patient" was the response to many queries, as noted in Mr. Jiménez's files, which also state: "At this time, patient remains a disposition problem."

Representing Mr. Jiménez's guardian, Mr. Banks took the position that the hospital had a responsibility to provide Mr. Jiménez with the rehabilitation he needed — even if it meant paying a rehabilitation center to provide it. That, he noted, could have benefited both the hospital and the patient.

"It would have been more cost-effective for them," Mr. Banks said, given that daily patient costs in long-term care are far lower than in acute-care hospitals. "And if the rehab worked, then Luis might have become a functional person and nobody's charge."

But the hospital declined, as Mr. Lord put it, "to take out our checkbook" and subsidize his care at another institution.

"Once you take that step, for how long are you going to do that — a year, 10 years, 50 years?" Mr. Lord, the lawyer, asked.

At that point, the hospital intensified its efforts to involve the Guatemalan government in the case. In a memorandum obtained by The New York Times, a consular official wrote that the hospital "informed us of how expensive it was becoming to care for Luis given that there was no insurance and that he is illegal and that the state won't assume responsibility for his charges."

Eventually, the Guatemalan health minister wrote a letter assuring Martin Memorial that his country was prepared to care for Mr. Jiménez. Gabriel Orellana, who was foreign minister at the time but did not have direct knowledge of the case, said the Guatemalan government was disposed to assist an American institution. "If a hospital in Florida asks if we can take care of a Guatemalan patient, the tendency is to say yes," Mr. Orellana said.

Mr. Gaspar was dubious, believing the public health care system in his homeland to be grossly inadequate.

So the guardian and the hospital reached an impasse, and Martin Memorial finally took the matter to court, asking a state judge to compel Mr. Gaspar to cooperate with its repatriation plan. In June 2003, a hearing was held before Circuit Judge John E. Fennelly.

The Journey Home

In the courthouse in Stuart, a low-key, upscale town that boasts world-class fishing, George F. Bovie III, a lawyer for Martin Memorial, addressed the judge: "This case is not simply a case, as some would try and paint it, of money. This is a case about care for a man in this country illegally who has reached maximum medical improvement at our hospital and is ready to be discharged and whose home government" is prepared to receive and treat him.

Mr. Banks responded: "Your honor, this is a case about a hospital that has failed to do its job properly," adding that the hospital sought to "have this court legitimize its patient dumping."

By the time of the hearing, Mr. Jiménez was essentially a boarder at the hospital, wheeling around the hallways and hanging out at the nursing stations. Diana Gregory, a nurse who supervises case management and discharge planning, said in a recent interview that Mr. Jiménez — "I will affectionately call him Louie" — became "like family" to hospital staff members, who bought him birthday cakes, knitted him blankets and gave him toys.

According to hospital records, however, it was not all pastries and presents. Mr. Jiménez grew depressed as he gradually became more cognizant of his situation. He showed signs of regression, too. Emotional and behavioral volatility often follow serious head injuries, and Ms. Gregory said that Mr. Jiménez had developed some disturbing habits, including spitting, yelling out, kicking and defecating on the floor.

In court, his doctor, Walter Gil, testified that Mr. Jiménez would benefit from returning to the intimacy of his family. In his case file, the doctor had noted that Mr. Jiménez had told him, "Estoy triste," meaning, "I'm sad."

Dr. Gil said he asked Mr. Jiménez, "Why are you sad when you have basically everything that could be offered to you?" And, he said, Mr. Jiménez replied, "I miss my family and my wife."

Mr. Banks's witnesses challenged what they described as Guatemala's vague offer to care for Mr. Jiménez.

Dr. Miguel Garcés, a prominent Guatemalan physician and public health advocate, said in a deposition that serious rehabilitation "is almost nonexistent" in Guatemala outside private facilities. He predicted that Mr. Jiménez would be taken in and then released from the country's one public rehabilitation hospital within a matter of weeks.

"I don't want him to go home and die," Dr. Garcés said.

"Nobody wants him to go home and die," the hospital's lawyer responded.

A few weeks later, Judge Fennelly ruled. "This Court," he wrote, "sails on uncharted seas." He acknowledged that his decision might provoke dissent but opined, "As Aquinas once stated, 'The good is not the enemy of the perfect,'" inverting and misattributing Voltaire's famous quote, "The perfect is the enemy of the good."

And then he granted the hospital's petition, ordering that Mr. Gaspar stop "frustrating" the hospital's plan to "relocate the ward" back to Guatemala.

Mr. Banks was stunned. He filed a notice of appeal and asked for a stay of the court's order while the appeal

was pending. The judge asked the hospital to file a response by 10 a.m. on July 10 before he ruled on the stay.

Four and a half hours before that response was due, shortly before daybreak on July 10, 2003, an ambulance picked up Mr. Jiménez at the hospital and drove him to the St. Lucie County airport, where an air ambulance waited to transport him back to Guatemala. Mr. Gaspar was not apprised.

"We went to see him at the hospital, and his bed was empty," he said.

The hospital's lawyer declined to comment on why the hospital did not wait for the judge to rule on the stay.

Diana Gregory, the nurse, traveled to Guatemala with Mr. Jiménez, bringing a wheelchair, a week's worth of medications, "lunch/snacks/juices/treats," and an emergency passport signed with a fingerprint, according to discharge records. Mr. Jiménez wore a Florida Marlins cap and carried a toy cellphone.

During the flight, the records said, Mr. Jiménez dozed, paged through picture books, pushed the window shade up and down and pointed outside, saying, "Look, look!" When he arrived in Guatemala, an ambulance took him to the National Hospital for Orthopedics and Rehabilitation, which occupies the converted stables of an old villa in the historic center of the capital city.

Ms. Gregory accompanied him there, turned over his records and toured the hospital. In a recent interview, Ms. Gregory said she was impressed by the place and especially by the staff's pride in it, despite equipment that looked "like it could have been donated to the Smithsonian." She added, "That facility could have taken care of me any day."

While Ms. Gregory was taking her tour, Mr. Jiménez was holding court, according to her notes in his file, "telling everyone that he was from Miami, Florida, and showing them his toy cat." At her request, a physician told Mr. Jiménez in Spanish "that he would be staying with his new friends in Guatemala and that I was leaving." His response, according to her notes: "O.K., O.K., adiós."

Glad that she had helped reunite Mr. Jiménez with his homeland, she said, "I left Guatemala quiet in my heart."

Care in Guatemala

Immaculately clean but dilapidated, Guatemala's National Hospital for Orthopedics and Rehabilitation operates on a shoestring budget of approximately \$400,000 a year, according to Dr. Harold Von Ahn, who was director when Mr. Jiménez arrived.

Half the hospital is devoted to orthopedic care and the other half serves as an "asylum" for profoundly disabled Guatemalans. Although it is the only public rehabilitation hospital in the country, it dedicates just 32 beds to rehabilitation and does not offer the specialized brain injury treatment that Mr. Jiménez needed.

The Guatemalan foreign ministry said that it knew of 53 repatriations by American hospitals in the last five years. During a visit by The Times to the National Hospital in June, the most recent arrival was an 18-year-old, Diana Paola Miguel, transported there by the University Medical Center in Tucson nine days after a van accident crushed her pelvis, which the Arizona hospital repaired. Supine on a gurney, she Ms. Paola was too

tremblingly upset to talk.

Dr. Von Ahn said he believed that American hospitals were dumping patients that should be their responsibility. "It's the same as the classic fall on the stairs, right?" he said. "You go to my home, you fall on my stairs and then you sue me. I am responsible."

Shortly after Mr. Jiménez arrived, the Guatemalan hospital contacted his common-law wife, Fabiana Domingo Laureano, who lived in the city of Antigua with their two young sons, and asked her to come get him. Ms. Domingo, who was 27 at the time, was shocked to learn that her husband was back and terrified by the request. Then as now, she was eking out a living, selling traditional woven clothing in a marketplace while sharing a spare, concrete room with her sons in her parents' humble home.

"I was already living from hand to mouth," she said in an interview in Antigua, where her sons now supplement her income by selling cigarettes after school. "How could I possibly have given him what he needs?"

The couple met as teenagers in the highland village of Soloma. In the mid-1990s, Mr. Jiménez migrated with his wife's family to Antigua, a volcano-ringed colonial city where tourism sustains the local economy. While she sold clothing, Mr. Jiménez worked as a bus driver's assistant. Together, they earned about \$6 a day, which was not enough to support their family, so Mr. Jiménez, with his wife's brother, Francisco Gaspar, decided to follow a well-traveled path to the north. That is when he changed his name from Gervacio Gaspar to Luis Jiménez, which is how he is now known, even by his family.

After pledging to pay a coyote, or smuggler, about \$2,000 each to ferry them into the United States, they crossed into California under cover of darkness and made their way to Encinitas, where Mr. Jiménez's older brother lived, Mr. Gaspar said.

After the two men failed to find regular work, Mr. Gaspar began suffering panic attacks and returned to Guatemala; Mr. Jiménez decided to try his luck in Florida.

"Lamentably," Mr. Gaspar said, "luck eluded him."

After the hospital contacted Ms. Domingo, Telemundo, the Spanish-language network, called Ms. Domingo and offered to take her to Guatemala City. Shortly thereafter, the network showed her reunion with her husband.

"You are Maria by chance?" Mr. Jiménez said to his wife as the television cameras rolled.

"Fabiana," she replied. Their two sons stood by her side, wide-eyed.

A few weeks later, Dr. Von Ahn said, the hospital discharged Mr. Jiménez "because we needed the bed," transferring him to another public hospital, San Juan de Dios. That is where Mr. Jiménez's brother, Enrique Lucas Gervacio, found him when he made his way down from the mountains by bus.

"He was lying in the hallway on a stretcher, covered in his own excrement," Mr. Lucas said. "So we cleaned him up and we brought him home."

In Favor of Jiménez

In May, 2004, a Florida appeals court overruled Judge Fennelly.

The Fourth District Court of Appeal found that the Florida state judge had overstepped his bounds because deportation is the prerogative of the federal government. The court also declared that no evidence supported the hospital's assertion that Mr. Jiménez would receive appropriate care in Guatemala; the discharge plan, the ruling said, was not detailed enough to satisfy federal requirements or the hospital's own rules.

The appeals court voided the judge's order although, given that Mr. Jiménez was already back in Guatemala, that action came too late for him.

It might affect others, though. The decision has become what is known legally as a case of first impression on the issue of hospital repatriations.

John DeLeon, a lawyer who advises the consulates of Mexico, Honduras and Guatemala in Miami, said he now referred to it when he received calls from hospitals looking to discharge seriously injured or ill immigrants.

"I now write I call my Montejo Gaspar letter," he said. "It's a letter that says, 'Listen, don't take action to dump this individual because you'll be risking legal action. The law is now that hospitals can't dump immigrant patients without securing appropriate after-care. If somebody has a serious illness and needs continuing care, a hospital can't simply discharge them onto the street, much less put them on a plane.'"

Mr. DeLeon said that he was "bombarded by such cases," adding that he was investigating another medical repatriation by Martin Memorial, which took place two weeks ago "behind the back of the Mexican government."

Martin Memorial confirmed that on July 16 they flew Neptali Díaz, a severely brain-injured patient to Mexico. A court order authorized Mr. Díaz's transfer to an unspecified Mexican hospital, ending the man's 859-day, \$2 million stay at Martin Memorial.

After the ruling in Mr. Jiménez's favor, Martin Memorial did not appeal. But the case did not go away. The appeals court ruling set the stage for a personal injury lawsuit, taken on by Searcy, Denney, Scarola, Barnhart & Shipley in West Palm Beach.

With that established firm behind him, Mr. Gaspar initiated a false imprisonment action claiming that his cousin was essentially kidnapped by the hospital and smuggled out of the country in a kind of medical rendition. Since then, appeals judges have again ruled in Mr. Jiménez's favor, stating the hospital can be sued for punitive damages as well as for the cost of his medical care.

This infuriates Ms. Plato Nicosia, the hospital administrator, who said it was Mr. Jiménez's family who owes the hospital money and not vice versa. "Should they win, we would like them to take those damages and pay his hospital bill," she said.

Jack Scarola, representing Mr. Jiménez's guardian, said that he empathized with the hospital's "significant

economic burden” but said that it was the “quid pro quo” of accepting Medicare and Medicaid funds to help finance the hospital’s services. (About 45 percent of Martin Memorial’s net operating revenues came from Medicare and Medicaid last year, based on state data.)

“Also,” he continued, “they chose the wrong way to deal with it. The right way would have been through the Legislature. There is no program in place to appropriately distribute care to undocumented persons who are catastrophically injured, and there should be. But you don’t stick a brain-injured immigrant on a private plane and spirit him out of the country in the predawn hours.”

Weighing Quality of Life

The journey to Jolomeú is an arduous one, as Mr. Jiménez’s new legal team discovered when several members — a lawyer, a paralegal, a priest and a bioethicist — first traveled there to meet him.

After a five-hour drive north from Guatemala City to Huehuetenango and then a winding trip, filled with hairpin turns on cliff-hugging roads up and over the Cuchumatán Mountains, they arrived at the provincial city of Soloma.

From there, the road to Mr. Jiménez’s hamlet only goes so far, and the trip must be completed on foot, up and down a rutted dirt path through goat-strewn meadows. The Americans arrived at the top panting. There, awaiting them, in an idyllically situated one-room brick house, was Mr. Jiménez, a broad grin lighting up his face.

“The first striking thing was his disposition: He was very, very happy,” said the Rev. Frank O’Loughlin, who pastored migrant workers in South Florida for decades. “Then, the second thing, he was well cared for. What I did was I got down over him and hugged him but also smelled. And there were no bedsores. Nothing was malodorous.”

As they drove back to Huehuetenango, Marnie R. Poncy, a nurse-lawyer who runs a bioethics law project in Palm Beach County, offered her view: “I said, ‘His quality of life is better than it would be in an American nursing home.’”

“But I hazarded a guess that his longevity of existence was probably severely curtailed,” she said.

Still, the team reached a conclusion that surprised them: “There was no real compelling reason to think of bringing him back to Florida,” Father O’Loughlin said. “We needed to focus on getting help to him or him to help in Guatemala.”

Help has been slow in arriving.

When The Times took the trek to visit him in late June, Mr. Jiménez had not budged from his hilltop home since returning there and no medical professional had visited him, either. With his mother too frail to move him into his wheelchair, his life had shrunken to the confines of his bed, across from his mother’s.

During the visit, Mr. Jiménez, wearing a nubby Adidas hat and a ski jacket, sat wrapped in a Guatemalan blanket; his mother, who wore a traditional woven skirt, with a floral scarf braided through her long gray

hair, stood by his side. She patted his head; he reached out to pick lint from her sweater.

A few days prior, he had suffered a particularly violent seizure.

"He was almost dead," his mother, Mrs. Gervacio, said in Kanjobal, which was translated into Spanish by a school principal serving as interpreter. "For many years, I am caring for him like he is a baby, changing his diaper, washing him. But this is worse. I am worried to leave him alone at all."

She is right to worry, said physicians consulted for this article. Patients suffering seizure disorders run the risk of injuring themselves — and of increasing their brain damage.

Still, Mrs. Gervacio does leave from time to time, she said, to go to Mass, shutting the door behind her and hoping for the best.

"It scares me a lot when you leave, Mama!" Mr. Jiménez blurted out, revealing that he was intently following the conversation that at first took place as if he were not there.

Given that Mr. Jiménez's mother's health is failing, the family worries about the future, too. And Mr. Jiménez shares their concern. "The day my mother is no longer, what's going to happen to me?" he said. "This is what I have on my mind."

Mr. Jiménez, whose memory is patchy, said he remembered nothing about his time in the United States — not Indiantown, not his job as a gardener, not the accident and not the hospital.

He does, remember the dreams that propelled his migration, and he expressed them eloquently: "I headed north like a peasant with a heavy bundle on his back, bent over, determined to better himself," he said. "Other people had things so I thought, 'Why not me?' But now I regret it. Maybe God was punishing me for my illusions."

"No, Luis," the interpreter interjected, "it was just chance, an accident, a car accident."

In Guatemala City, Dr. Garcés, the public health advocate, said that he was not surprised that, as he had predicted, Mr. Jiménez never received further medical care. "That's the usual story of patients that are released from the National Orthopedic Hospital," he said.

Dr. Garcés called Mr. Jiménez's repatriation "inhumane."

"In cases like that, if you cut the medical care, you're hurting that person," Dr. Garcés said. "You're doing just the opposite of what the medical system should do. That goes against every international convention of human rights and health. To send him to Guatemala was to send him to very poor living and health conditions and probably he will die because of that, and that's not fair."

Without evaluation, doctors cannot know what potential for rehabilitation — or survival — Mr. Jiménez possesses.

If Mr. Jiménez's guardian were to prevail in the lawsuit, "it would be possible to set up a good health care

arrangement for him because in private practice we have all types of specialties that he needs," Dr. Garcés said. "And transportation could be arranged." But the case could drag on for years.

On the day of The Times's visit, before Mr. Jiménez ate a lunch of eggs, tortillas and sugar water, Mr. Banks, the lawyer, gave him a present from his cousins in Florida — a plastic bag bulging with tube socks, undershirts and oversize sweatpants. Mr. Jiménez fingered the clothing with little interest but when a reporter began to read him the accompanying letter in Spanish, he snatched it excitedly from her hands.

Much to the surprise of his visitors, Mr. Jiménez, despite his brain injury, could read. He smoothed out the yellow legal paper from Mr. Gaspar and began: "I am sending you some little things. Luis, I hope that you like them."

At first, Mr. Jiménez read haltingly, then more fluidly. Later, when all his visitors had gone outside, he read the ending aloud again to himself.

"I want to tell you," he read, "that we miss you and love you a lot. May God continue to bless you."

Mr. Jiménez smiled, and repeated, softly, "May God continue to bless you."

Pilar Conci contributed reporting.

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July 31, 2008

Decline Seen in Numbers of People Here Illegally

By JULIA PRESTON

The number of illegal immigrants in the country has dropped by as much as 1.3 million in the past year, an 11 percent decline since a historic peak last August, an immigration research group in Washington said in a report released Wednesday.

The report, by Steven A. Camarota and Karen Jensenius of the Center for Immigration Studies, found "strong indications" that stepped-up enforcement by immigration authorities had played a major role in the decline.

The report, which is based on monthly census surveys as recent as May, added to a growing body of studies indicating that the population of illegal immigrants in the United States is dropping significantly.

The study's methods and conclusions were questioned by other demographers and economists, who said the decline might be less than the center reported and was more likely the result of the weak economy, especially in low-wage construction and manufacturing where illegal immigrants are generally employed.

"The decline can easily be explained by changes in the economy," said Steve Levy, senior economist at the Center for Continuing Study of the California Economy in Palo Alto. He said California had lost 134,000 construction jobs since the summer of 2006.

"The housing sector woes and weakening economy have been known for a long time and can explain why unauthorized immigrants would stop coming and why some of those here would leave," Mr. Levy said.

The Center for Immigration Studies is a policy advocacy group that favors reduced immigration and opposes legislation to give legal status to illegal immigrants. The study supports the center's contention that border enforcement and a crackdown on unauthorized workers and their employers would lead many illegal immigrants to leave the United States without being deported.

"The evidence presented here suggests that it has been possible to cut the illegal population by inducing a large number of people to leave the country," the study said.

Federal immigration officials praised the results. "It reinforces what we always thought, that comprehensive enforcement is a critical part of the reduction," said Kelly A. Nantel, a spokeswoman for Immigration and Customs Enforcement.

The arguments provoked by the study reflected the difficulties of discussing options for stemming illegal immigration, when researchers cannot agree on how many illegal immigrants there are and how they are affected by immigration enforcement.

Mr. Camarota and Ms. Jensenius based their findings on census figures for foreign-born Hispanics ages 18 to 40 with a high school degree or less. They estimated that three-quarters of those Hispanics were illegal immigrants, and that they made up about two-thirds of the illegal immigrants in the United States.

Using those estimates, they concluded that the illegal immigrant population had dropped to 11.2 million, from a historic high of 12.5 million in August 2007.

Jeffrey Passel, a demographer at the Pew Hispanic Center in Washington who studies illegal immigration, said his research also showed a decline in immigrants. But because of recent changes in the census's data reporting, he said it was too soon to make precise calculations.

Wayne Cornelius, director of the Center for Comparative Immigration Studies at the University of California, San Diego, said Mr. Camarota and Ms. Jensenius had applied "highly arguable assumptions" to their data.

"They offer no direct evidence that fewer undocumented immigrants are attempting to come to the United States, or that fewer of them are getting in, or that more of those already here are leaving the United States as a result of enforcement efforts," said Mr. Cornelius, who has studied the impact of border enforcement over the past 15 years.

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June 9, 2008

States Take New Tack on Illegal Immigration

By DAMIEN CAVE

MILTON, Fla. — Three months after the local police inspected more than a dozen businesses searching for illegal immigrants using stolen Social Security numbers, this community in the Florida Panhandle has become more law-abiding, emptier and whiter.

Many of the Hispanic immigrants who came in 2004 to help rebuild after Hurricane Ivan have either fled or gone into hiding. Churches with services in Spanish are half-empty. Businesses are struggling to find workers. And for Hispanic citizens with roots here — the foremen and entrepreneurs who received visits from the police — the losses are especially profound.

“It was very hard because the community is very small, and to see people who came to eat here all the time then come and close the business,” said Geronimo Barragan, who owns two branches of La Hacienda, Mexican restaurants where the police arrested 10 employees.

“I don’t blame them,” Mr. Barragan added. “It’s just that it hurts.”

Sheriff Wendell Hall of Santa Rosa County, who led the effort, said the arrests were for violations of state identity theft laws. But he also seemed proud to have found a way around rules allowing only the federal government to enforce immigration laws. In his office, the sheriff displayed a framed editorial cartoon that showed Daniel Boone admiring his arrest of at least 27 illegal workers.

His approach is increasingly common. Last month, 260 illegal immigrants in Iowa were sentenced to five months in prison for violations of federal identity theft laws.

At the same time, in the last year, local police departments from coast to coast have rounded up hundreds of immigrants for nonviolent, often minor, crimes, like fishing without a license in Georgia, with the end result being deportation.

In some cases, the police received training and a measure of jurisdiction from the federal Immigration and Customs Enforcement, under a program that lets officers investigate and detain people they suspect to be illegal immigrants.

But with local demand for tougher immigration enforcement growing, 95 departments are waiting to join the 47 in the program. And in a number of places, including Arkansas, Florida, Georgia, Iowa, New Mexico, Oklahoma and Texas, police officers or entire departments are choosing to tackle the issue on their own.

State lawmakers, in response to Congressional inaction on immigration law, are giving local authorities a wider berth. In 2007, 1,562 bills related to illegal immigration were introduced nationwide and 240 were

enacted in 46 states, triple the number that passed in 2006, according to the National Conference of State Legislatures. A new law in Mississippi makes it a felony for an illegal immigrant to hold a job. In Oklahoma, sheltering or transporting illegal immigrants is also a felony.

It remains unclear how the new laws will be enforced. Yet at the very least, say both advocates and critics, they are likely to lead to more of what occurred here: more local police officers demanding immigrants' documents; more arrests for identity theft; more accusations of racial profiling; and more movement of immigrants, with some fleeing and others being sent to jail.

"It is a way to address illegal immigration without calling it that," said Jessica Vaughan, a senior policy analyst at the Center for Immigration Studies, which supports intensified local enforcement. She added, "They don't just have to sit and wait for Washington."

Community Complaints

Police officers here in a handful of Gulf Coast counties from Pensacola to Tallahassee said they started hearing complaints about illegal immigrants last year. With the national debate raging and the local economy sagging, many residents began to question whether illegal immigrants were taking Americans' jobs.

It did not show up in statistics — the unemployment rate in Santa Rosa County was 3.6 percent in 2007, below state and national averages — so the arguments focused in part on unfair competition.

Donna Tucker, executive director of the Santa Rosa County Chamber of Commerce, said illegal immigration "creates havoc within the system" because businesses that used illegal labor often did not pay into workers' compensation funds and paid workers less.

"Those businesses can survive a lot longer than the ones that are trying to do things right," Ms. Tucker said.

Some of the frustrations also veered into prejudice.

George S. Collins, an inspector in charge of the illegal trafficking task force in Okaloosa County, said many people wanted to know "why we weren't going to Wal-Mart and rounding up the Mexicans" — a comment Mr. Collins said was racist and offensive.

Usually though, the complaints were cultural and legal.

Interviews with more than 25 residents and police officers suggest that the views of Harry T. Buckles, 68, a retired Navy corpsman, are common. Outside his home in Gulf Breeze, Mr. Buckles said the main problem with today's Hispanic immigrants was that they did not assimilate.

Even after hundreds flowed in to rebuild Santa Rosa County, Mr. Buckles said: "They didn't become part of the community. They didn't speak the language."

Echoing the comments of others, he said he became irritated when he heard Spanish at the Winn-Dixie and saw a line of immigrants sending money home at the Western Union. Mr. Buckles said he feared his community would lose its character and become like Miami, with its foreign-born majority and common use

of Spanish.

"We see things nationwide and we know that we could be overwhelmed," he said.

In fact, only about 3 percent of the population of Santa Rosa County is Hispanic, according to census figures compiled in 2006. As a proportion of its population, the Hispanic community here is less than half the size of what is in Omaha or Des Moines — mostly white cities where the Hispanic population is still below the national average.

Santa Rosa is hardly the only place to use a tough approach against a small immigrant population. In Mississippi, where strict laws on false documentation recently passed, only about 1.7 percent of the state's 2.9 million people were born abroad and more than half of them are in the United States legally, according to estimates from the Federation for American Immigration Reform, which favors tightening restrictions on immigration.

But here, the result is a divide often marked by a lack of in-depth interaction.

On one side are longtime residents like Sheriff Hall, who said immigrant laborers were not involved in fixing his office or home after the hurricanes, and Mr. Buckles, who said his relationship with Hispanics was based mainly on seeing them at stores or construction sites.

On the other side are a smaller number of immigrants and employers who use immigrant labor.

Some of the immigrants are newly arrived, sticking mostly to themselves. But the group also includes Antonio Tejeda, 38, a roofer and naturalized American citizen from Mexico who wears an N.F.L. jersey to church and speaks English with a slight drawl; and Ruben Barragan, 19, one of the workers arrested in one of the La Hacienda restaurant raids who, though illegal, spoke English and called his infant son Eric because he wanted him to have an American name.

When told about such men, Mr. Buckles said perhaps the government could find ways to create exceptions. But he was not convinced they deserved to stay.

"They got here illegally," Mr. Buckles said. "They broke the law as soon as they came."

The Raids

The half-dozen officers involved in the Santa Rosa operations did not announce their arrival. They detained 13 workers at Panhandle Growers. At the two branches of La Hacienda the police quietly detained 10 workers without resistance. And at Emerald Coast Interiors, a boat-cushion factory, the police arrested a handful more.

Sheriff Hall said that his department received tips that led him to all the locations he visited and that he was responding to a steep rise in complaints about illegal immigration. He said he had been frustrated a year ago by a lack of response from Immigration and Customs Enforcement. And this time, customs officials said, he did not contact the agency for input before forming a multicounty task force that led to the February operation.

Sheriff Hall said his men were focused on identity theft and did not need special training because "it's the same thing we do every day." He insisted that the officers treated everyone fairly. Unlike Bay County officers, who surrounded construction sites last year and arrested immigrants who ran, "we didn't chase anyone," he said.

And at many locations witnesses said the police treated all workers equally.

Managers at the restaurants Okki, El Rodeo, China Sea and La Hacienda said police officers checked all employees' documents, regardless of their ethnicity.

But other business owners, employees and residents said the police focused disproportionately on Hispanics or the foreign born and seemed determined to scare immigrants out of the area. In many cases, employers said, the officers did not even mention identity theft, narrowing their scope to immigrants.

"They were targeting all the places with Hispanic workers," said Elvin Garcia, 26, a waiter at El Rodeo.

At Red Barn Barbecue, witnesses said that skin color clearly influenced police procedure. When several officers visited and saw no one who was Hispanic in the kitchen, they moved on. "We offered to give them records, and they said, 'No, it's not necessary,'" said Randy Brochu, whose family owns the business.

Meanwhile, at Emerald Coast Interiors, three employees — one black, one white, one Hispanic — independently said the police did, in fact, chase a handful of Hispanic employees who ran. Three women, they said, were caught in a ditch behind the main building.

Luis Ramirez, the plant's operations manager, said the officers asked to see documentation only for the workers who fled. "It was racial profiling," Mr. Ramirez said.

His company has not filed a lawsuit, so his accusations have not been tested. But Florida courts have repeatedly held that flight alone is not enough to justify a suspicion of criminal activity or arrest. In Bay County, officials said they tried to avoid chasing people now because prosecutors have warned that it undermines their cases.

Even without a chase, immigrant advocates say that local efforts to track down illegal immigrants undermine community safety by scaring immigrants from reporting violent crimes.

"It's a dangerous route to take," said David Urias, a staff lawyer with the Mexican American Legal Defense Fund, which sued Otero County in New Mexico this year after the police raided Hispanics' homes for minor violations like an unleashed dog. "What you're going to see," Mr. Urias said, "is more people pushed into the shadows."

The Aftermath

Indeed, three months after the sweeps, nearly everyone agrees that the fabric of this community has changed. Hundreds of Hispanic families, both legal and illegal, seem to have disappeared.

John Davy, a co-owner of Panhandle Growers, said some employers "treated their guys humanely" by helping

them flee to other areas. "What we're victims of is a system that's broken," he said.

Many residents said they felt torn between competing loyalties to compassion and the law.

"On one hand, I'm sitting here thinking when Ivan was here, you could not get enough people to do the thing that needed to get done," said Mrs. Tucker at the Chamber of Commerce. "And these illegal aliens, people welcomed them with open arms because they were working hard, they were helping our community. But from a chamber standpoint, you're operating on the side of the law. It's a hard thing."

In the immigrant community, fears now cloud the most basic routines. Many Hispanics said they avoided being seen or heard speaking Spanish in Wal-Mart, even if they live here legally. Others detailed their habit of meticulously checking their cars' headlights, blinkers and registration to avoid being pulled over.

The message many Hispanics have taken from the raids is simple. "We're Mexican — they don't want us here," said Erika Barragan, 20, whose husband, Ruben, came here illegally roughly six years ago and was one of 23 people scheduled to be deported after the February raids. She said she would go back to Mexico this summer.

Her husband's employers, Geronimo Barragan (no relation) and his wife, Guilla, are trying to remain positive.

They are citizens and parents of four American-born children, ages 2 to 16. They have lived in Santa Rosa County for more than a decade, founding a Baptist church here and working 16-hour days, six days a week to build two restaurants known for their affordable food and Christian atmosphere, which extends to a ban on alcohol.

They said the raids came as a shock.

"We love the community, and we always tried to do our best," Mr. Barragan said.

Mrs. Barragan put it more bluntly. "This," she said, "is like our promised land."

The Barragans said they did not know their workers were illegal because they provided Social Security numbers and other information that was required. Like most employers, they asked for nothing more.

They have not publicly opposed the sheriff's actions, and in their effort to move on, they have distanced themselves from his critics. Mr. Barragan even visited Sheriff Hall at his office to tell him he had no hard feelings and would do everything he could to comply in the future.

And yet, the cost has been significant. Both of the restaurants were closed for more than two months. Only one has recently reopened.

Unable to find people in the area who can cook Mexican food, Mr. Barragan, 41, has been scouring the nation, recruiting in Houston, Chicago and Baton Rouge. He has yet to find all the workers he needs, relying on a handful of new hires with work visas that expire in November. He said he wished that Congress could find a way to bring more foreign workers to America legally.

For Mrs. Barragan, 39, a warm, thin woman with hair to her waist, the consequences have been more personal. On a recent Wednesday night, her church's prayer service was half-empty. Many of her friends have left. And many of the employees that her family mentored in the ways of America are gone, taken away by the police.

"That's what had the most effect on our lives," Mrs. Barragan said, speaking in Spanish so she could be more specific. "Not closing La Hacienda, or 'we're not going to make money,' or 'how are we going to pay our bills?' I personally didn't think about that. It hurt me more to see them there — handcuffed. The way they went out."

Her husband agreed, explaining between bouts of tears that some of the deported workers' families had become victims of more violent crime. "One of them has a small daughter and someone robbed their house while he was in jail," Mr. Barragan said. "Twice."

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Immigration and Refugees

E-MAIL SAVE

Since the early 1800's, immigration has been both a crucial component of America's growth and a periodic source of conflict, and in recent years it has become one of the most contentious issues on the nation's political agenda.

In 2003, President Bush called for a comprehensive overhaul of the nation's immigration laws, the first since the mid-80's. His proposal focused on creating a guest worker program that would allow immigrants to legally enter the country temporarily to fill jobs that employers say would otherwise go unfilled. The plan was overshadowed by the opening of the Iraq war and was set aside during the campaign season of 2004.

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Border Agents, Lured by the Other Side

By RANDAL C. ARCHIBOLD and ANDREW BECKER

Scores of corruption cases in recent years have alarmed Homeland Security officials just as it is hiring thousands of border agents to stem the flow of illegal immigration.

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At the U.S. Border, the Desert Takes a Rising Toll

By RANDAL C. ARCHIBOLD

The number of migrants dying while trying to cross into Pima County, Ariz., is on pace this year to set a record.

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Three Sisters: A Series From The New York Times

Reporters and a photographer from The New York Times spent a week following three sisters who immigrated to the United States.

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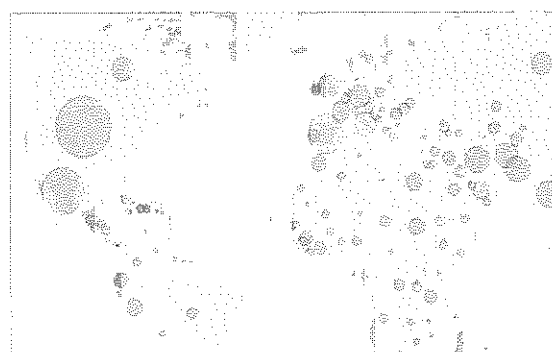
U.S. Set for a Crackdown on Illegal Hiring

By JULIA PRESTON

Federal authorities are expected to announce rules that would require employers to fire workers who use false Social Security numbers.

August 8, 2007 | WASHINGTON | NEWS

Interactive Graphic: Global Migration



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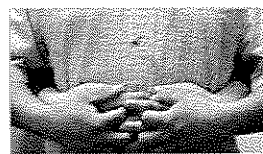
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Hiding in Waukegan
Julia Preston reports on how illegal immigrants and their families have retreated from community life following immigration raids and local clampdown measures.

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Nearly 190 million people, about three percent of the world's population, lived outside their country of birth in 2005. A look at the flow of people around the globe.

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Britain: Some Residents to Get ID Cards

By SARAH LYALL

The government introduced a new mandatory identity card for foreign nationals living in Britain who hold student or marriage visas.

September 26, 2008

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Miroslav Havel, a Glass Master, Is Dead at 86

By BRUCE WEBER

Mr. Havel was one of a pair of unlikely Czech immigrants to Ireland who together revived the Waterford glass industry after a century's dormancy.

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Ellis Island Museum to Expand, Touching on Other Eras

By DAVID W. DUNLAP

A \$20 million expansion will take the story of immigration told at the museum to the eras before and after the period when Ellis Island was the portal to America.

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Citizenship Seekers Told Not to Fear a New Test

By KIRK SEMPLE

A week before a new civics test is introduced as part of the naturalization process, a senior immigration official sought to calm critics who say it will be harder than the current one.

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'White Flight' Has Reversed, Census Finds

By SAM ROBERTS

A slight population increase in the number of non-Hispanic whites marks the reversal of more than a half-century of so-called white flight from New York City.

September 23, 2008

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Mukasey Vacates Panel's Decision Denying Asylum to Malian Woman

By TRYMAINE LEE

The ruling sends the case back to an immigration board that had denied asylum for a Malian woman who said she feared genital mutation and forced marriage if she were returned to Mali.

September 23, 2008

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Consulate for Ecuadoreans Reaches Where They Live

By FERNANDA SANTOS

Ecuador extends its reach outside Manhattan, inaugurating a consular outpost in Queens, the borough where most of its citizens live.

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From New York Soil, the Taste of Home

By SARAH KRAMER

At the St. George Greenmarket in Staten Island, Agustín Juárez transports his customers back to their native Mexico with his chilies and tomatillos.

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Since Poland joined the European Union in 2004, more than a million Poles, mainly young, have come to Britain.

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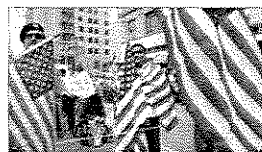


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A Farm Like Home

A Land of Opportunity Lures Poles Back Home

By KIRK SEMPLE

New York's Polish community is shrinking, as waves of immigrants and their families are being lured back to Poland by a vibrant economy there.

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By THE ASSOCIATED PRESS

Spain will pay jobless immigrants to go home under a decree approved Friday, more evidence that its once booming economy is sputtering.

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Illinois: Arrests in Fake ID Ring

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Federal agents said they had arrested 15 members of a counterfeit documents ring and were searching for six others.

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By LARRY ROHTER

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By CARLOTTA GALL

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Looming Food Crisis in Afghanistan

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Immigration is a complicated and combustible issue but that is no excuse for the presidential candidates to ignore or lie about it to voters.

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By JIM RUTENBERG

An ad on Spanish language TV says Democrats caused immigration reform to fail, but members of both parties took the blame in 2007.

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Balancing National Security and the Rights of Visitors

By CINDY RODRÍGUEZ

Some say the broad powers granted to customs officials after 9/11 have lead to mistreatment of foreign visitors at Newark Liberty International Airport.

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CUSTOMS AND BORDER PROTECTION

An East Coast Latino Lifeline, on the Road for 30 Years

By KIRK SEMPLE

For 30 years the Omnibus La Cubana has been the transportation of choice for many Latinos traveling between New York and Miami.

September 14, 2008

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Aboard La Cubana

'Make a Wish, Say a Prayer'

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The news that there are fewer than 1,000 Italians left in Little Italy is impetus to stroll this year's San Gennaro street festival to see who's left.

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Rapper Is Issued Visa

COMPILED BY JULIE BLOOM

Snoop Dogg has been granted a visa to enter Australia, The Associated Press reported.

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By MARC LACEY

The resolve of the people of Gonaïves, Haiti, is being tested by a string of tropical storms and hurricanes.

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Reporter Charlie LeDuff interviews border watchers Britt Craig and Robert Cook.



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Borders, Open and Closed

Nina Bernstein discusses pendulum shifts in Mexican immigration.



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One Immigrant's Story

As illegal immigrants in the United States have increased in numbers, so have the ranks of those who want to swindle them.

AUDIO: Class Matters: The Story of Two Immigrants

For John Zannikos, who came to New York from Greece in 1953, the restaurant business has been the key to the American promise of upward mobility. For Juan Manuel Peralta, who came from Mexico nearly 40 years later and worked for Mr. Zannikos as a cook, restaurant work has been a dead end.



WORKING IMMIGRANTS

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Review of workers compensation coverage of illegal workers

A recent article in the quarterly journal of the International Association of Industrial Accident Boards and Commissions (IAIABC) reviews statutes and court decisions regarding workers comp coverage of undocumented workers. I have placed the entire article below - it is part I; part II is yet to appear. The authors say that 6 states have statutes that expressly authorize coverage for these workers - CA, FL, NV, NY, TX and UT, while two states' laws expressly do not - ID and WY. Twelve states have had court decisions in favor of coverage - IL, MI, MN, ND, OH, AL, AZ, CO, MT, NC, SC and VA. Two of these states - MI and VA - also have court decisions going the other way. Two other states have had court decisions which go against coverage -- KS and PA. You ought to consider this list giving a rosier picture of coverage than is the case, because some states, notably NY, constrict the benefits of these workers, though not denying them outright.

By Thomas R. Lee and Dennis V. Lloyd

Illegal immigration is a hot-button issue that has spawned a wide range of legal and public policy questions -- including questions regarding workplace injuries involving undocumented workers. The threshold question is eligibility for workers' compensation benefits, which is a matter of state law.

Coverage of Illegal Aliens under Workers' Compensation Statutes in Various States

At least eight states have workers' compensation statutes that expressly address the eligibility of illegal aliens. Six of those states (California, Florida, Nevada, New York, Texas, and Utah) expressly include illegal aliens in their workers' compensation coverage. Two states (Idaho and Wyoming) expressly exclude illegal aliens from workers' compensation coverage. In these states, the courts uniformly hold that illegal workers are covered where they are within the express terms of the statute and not covered where they are not.

A second set of statutes expressly address aliens, but without clear reference to their legal status. In five states (Illinois, Michigan, Minnesota, North Dakota, and Ohio), workers' compensation laws expressly include aliens but make no express reference to their legal or illegal status. The courts in those states have held that these statutes apply to illegal aliens. In several other states (Alabama, Arizona, Colorado, Montana, North Carolina, South Carolina, and Virginia), the legislature extends coverage to "aliens and minors" who are "legally authorized" to work. Even these statutes have been interpreted to apply to both legal and illegal aliens, on the rationale that the "legally authorized" modifier applies only to minors.

The third and largest set of statutes do not address aliens at all. Nineteen states (Alaska, Arkansas, Connecticut, Delaware, Hawaii, Iowa, Kansas, Louisiana, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Vermont) have very broad definitions of

covered workers, largely paralleling the federal definition: "an individual employed by an employer." Five states (Georgia, Indiana, Kentucky South Dakota, and Wisconsin) use similarly broad language, while expressly including minors. Six other states (Maryland, Mississippi, Missouri, Oregon, Tennessee, and West Virginia) also include minors within their broad definition of covered workers, while specifying that minors are covered regardless of their illegal status. A few courts have found that these sorts of statutes encompass both legal and illegal aliens.

Exclusion of Illegal Aliens on Alternative Statutory Grounds

Even where illegal aliens fall within a broad definition of covered workers, they are sometimes excluded on alternative grounds, such as the absence of an enforceable contract, fraud, or lack of causation.

The seminal case is *Granados v. Windson Development Corp.* (Virginia, 1999, 509 S.E.2d 290). Granados held that because illegal aliens "cannot be employed lawfully in the United States," the employment contract was void and Granados was therefore not an "employee" for purposes of the Virginia workers' compensation statute. However, the Virginia Legislature subsequently overruled this decision. Several other states have recently declined to follow the Granados holding.

In *Doe v. Kansas Department of Human Resources*, the Kansas Supreme Court acknowledged that the illegal alien claimant was "legally entitled to ... benefits" under the Kansas workers' compensation statute, but concluded that her benefits could be suspended on the basis of the "fraudulent and abusive" act she committed when she misrepresented her identity.

The Michigan Court of Appeals reached a similar conclusion in *Sanchez v. Eagle Alloy*.

The Pennsylvania Supreme Court has refused workers' compensation benefits to an undocumented worker on causation grounds. In *Reinforced Earth Co. v. WCAB (Astudillo)*, the court held that while the claimant was entitled to the wage-replacement benefits he received, those benefits could be suspended on the grounds that the claimant's disability was not caused by his workplace injury, but rather by his illegal status. Pennsylvania courts have consistently followed this approach in subsequent cases.

Thomas R. Lee is a professor of law at Brigham Young University and Dennis V. Lloyd is chief legal counsel at the Utah Workers Compensation Fund. This column first appeared in the American Association of State Compensation Insurance Funds quarterly news.

Posted by Peter Rousmaniere on July 19, 2007 3:17 PM | [Permalink](#)

COMMENTS

Very helpful post! Thanks.

Posted by: [Nancy Germond, ARM, AIC](#) | August 6, 2007 9:50 AM

This is all very interesting, about claims being covered or not, but what about the employer? I'm a WC underwriter, and I see claims reports regularly that advise me that the injured worker was an illegal immigrant, usually in the construction industries, and often very serious injuries. Does the fact that the employer hired an illegal immigrant make that employer a criminal? Does it taint his integrity to such an extent that I

should not trust him any more to deal in good faith with me, as his insurer? Or should I regard this transgression as no more indicative of his morals than a speeding ticket? I'm afraid our immigration laws, like our marijuana laws and our liquor prohibition laws of the 1930's, are turning a large and responsible segment of our society into lawbreakers, with similarly unnecessary destructive consequences to our integrity as a society.

Posted by: Mikk Hinnov | [August 8, 2007 5:50 PM](#)

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Steven Malanga

How Unskilled Immigrants Hurt Our Economy

A handful of industries get low-cost labor, and the taxpayers foot the bill.

Summer 2006

The day after Librado Velasquez arrived on Staten Island after a long, surreptitious journey from his Chiapas, Mexico, home, he headed out to a street corner to wait with other illegal immigrants looking for work. Velasquez, who had supported his wife, seven kids, and his in-laws as a *campesino*, or peasant farmer, until a 1998 hurricane devastated his farm, eventually got work, off the books, loading trucks at a small New Jersey factory, which hired illegals for jobs that required few special skills. The arrangement suited both, until a work injury sent Velasquez to the local emergency room, where federal law required that he be treated, though he could not afford to pay for his care. After five operations, he is now permanently disabled and has remained in the United States to pursue compensation claims.

"I do not have the use of my leg without walking with a cane, and I do not have strength in my arm in order to lift things," Velasquez said through an interpreter at New York City Council hearings. "I have no other way to live except if I receive some other type of compensation. I need help, and I thought maybe my son could come and work here and support me here in the United States."

Velasquez's story illustrates some of the fault lines in the nation's current, highly charged, debate on immigration. Since the mid-1960s, America has welcomed nearly 30 million legal immigrants and received perhaps another 15 million illegals, numbers unprecedented in our history. These immigrants have picked our fruit, cleaned our homes, cut our grass, worked in our factories, and washed our cars. But they have also crowded into our hospital emergency rooms, schools, and government-subsidized aid programs, sparking a fierce debate about their contributions to our society and the costs they impose on it.

Advocates of open immigration argue that welcoming the Librado Velasquezes of the world is essential for our American economy: our businesses need workers like him, because we have a shortage of people willing to do low-wage work. Moreover, the free movement of labor in a global economy pays off for the United States, because immigrants bring skills and capital that expand our economy and offset immigration's costs. Like tax cuts, supporters argue, immigration pays for itself.

But the tale of Librado Velasquez helps show why supporters are wrong about today's immigration, as many Americans sense and so much research has demonstrated. America does not have a vast labor shortage that requires waves of low-wage immigrants to alleviate; in fact, unemployment among unskilled workers is high—about 30 percent. Moreover, many of the unskilled, uneducated workers now journeying here labor, like Velasquez, in shrinking industries, where they force out native workers, and many others work in industries where the availability of cheap workers has led businesses to suspend investment in new technologies that would make them less labor-intensive.

Yet while these workers add little to our economy, they come at great cost, because they are not economic abstractions but human beings, with their own culture and ideas—often at odds with our own. Increasing numbers of them arrive with little education and none of the skills necessary to succeed in a modern economy. Many may wind up stuck on our lowest economic rungs, where they will rely on something that immigrants of other generations didn't have: a vast U.S. welfare and social-services apparatus that has enormously amplified the cost of immigration. Just as welfare reform and other policies are helping to shrink America's underclass by weaning people off such social programs, we are importing a new, foreign-born underclass. As famed free-market economist Milton Friedman puts it: "It's just obvious that you can't have free immigration and a welfare state."

Immigration can only pay off again for America if we reshape our policy, organizing it around what's good for the economy by welcoming workers we truly need and excluding those who, because they have so little to offer, are likely to cost us more than they contribute, and who will struggle for years to find their place here.

Hampering today's immigration debate are our misconceptions about the so-called first great migration some 100 years ago, with which today's immigration is often compared. We envision that first great migration as a time when multitudes of Emma Lazarus's "tired," "poor," and "wretched refuse" of Europe's shores made their way from destitution to American opportunity. Subsequent studies of American immigration with titles like *The Uprooted* convey the same impression of the dispossessed and displaced swarming here to find a new life. If America could assimilate 24 million mostly desperate immigrants from that great migration—people one unsympathetic economist at the turn of the twentieth century described as "the unlucky, the thriftless, the worthless"—surely, so the story goes, today's much bigger and richer country can absorb the millions of Librado Velasquezes now venturing here.

But that argument distorts the realities of the first great migration. Though fleeing persecution or economic stagnation in their homelands, that era's immigrants—Jewish tailors and seamstresses who helped create New York's garment industry, Italian stonemasons and bricklayers who helped build some of our greatest buildings, German merchants, shopkeepers, and artisans—all brought important skills with them that fit easily into the American economy. Those waves of immigrants—many of them urban dwellers who crossed a continent and an ocean to get here—helped supercharge the workforce at a time when the country was going through a transformative economic expansion that craved new workers, especially in its cities. A 1998 National Research Council report noted "that the newly arriving immigrant nonagricultural work force . . . was (slightly) more skilled than the resident American labor force": 27 percent of them were skilled laborers, compared with only 17 percent of that era's native-born workforce.

Many of these immigrants quickly found a place in our economy, participating in the workforce at a higher rate even than the native population. Their success at finding work sent many of them quickly up the economic ladder: those who stayed in America for at least 15 years, for instance, were just as likely to own their own business as native-born workers of the same age, one study found. Another study found that their American-born children were just as likely to be accountants, engineers, or lawyers as Americans whose families had been here for generations.

What the newcomers of the great migration did not find here was a vast social-services and welfare state. They had to rely on their own resources or those of friends, relatives, or private, often ethnic, charities if things did not go well. That's why about 70 percent of those who came were men in their prime. It's also why many of them left when the economy sputtered several times during the period. For though one often hears that restrictive anti-immigration legislation starting with the Emergency Quota Act of 1921 ended the first great migration, what really killed it was the crash of the American economy. Even with the 1920s quotas, America welcomed some 4.1 million immigrants, but in the Depression of the 1930s, the number of foreign immigrants tumbled far below quota levels, to 500,000. With America's streets no longer paved with gold, and without access to the New Deal programs for native-born Americans, immigrants not only stopped coming, but some 60 percent of those already here left in a great remigration home.

Today's immigration has turned out so differently in part because it emerged out of the 1960s civil rights and Great Society mentality. In 1965, a new immigration act eliminated the old system of national quotas, which critics saw as racist because it greatly favored European nations. Lawmakers created a set of broader immigration quotas for each hemisphere, and they added a new visa preference category for family members to join their relatives here. Senate immigration subcommittee chairman Edward Kennedy reassured the country that, "contrary to the charges in some quarters, [the bill] will not inundate America with immigrants," and "it will not cause American workers to lose their jobs."

But, in fact, the law had an immediate, dramatic effect, increasing immigration by 60 percent in its first ten years. Sojourners from poorer countries around the rest of the world arrived in ever-greater numbers, so that whereas half of immigrants in the 1950s had originated from Europe, 75 percent by the 1970s were from Asia and Latin America. And as the influx of immigrants grew, the special-preferences rule for family unification intensified it further, as the pool of eligible family members around the world also increased. Legal immigration to the U.S. soared from 2.5 million in the 1950s to 4.5 million in the 1970s to 7.3 million in the 1980s to about 10 million in the 1990s.

As the floodgates of legal immigration opened, the widening economic gap between the United States and many of its neighbors also pushed illegal immigration to levels that America had never seen. In particular, when Mexico's move to a more centralized, state-run economy in the 1970s produced hyperinflation, the disparity between its stagnant economy and U.S. prosperity yawned wide. Mexico's per-capita gross domestic product, 37 percent of the United States' in the early 1980s, was only 27 percent of it by the end of the decade—and is now just 25 percent of it. With Mexican farmworkers able to earn seven to ten times as much in the United States as at home, by the 1980s illegals were pouring across our border at the rate of about 225,000 a year, and U.S. sentiment rose for slowing the flow.

But an unusual coalition of business groups, unions, civil rights activists, and church leaders thwarted the call for restrictions with passage of the inaptly named 1986 Immigration Reform and Control Act, which legalized some 2.7 million unauthorized aliens already here, supposedly in exchange for tougher penalties and controls against employers who hired illegals. The law proved no deterrent, however, because supporters, in subsequent legislation and court cases argued on civil rights grounds, weakened the employer sanctions. Meanwhile, more illegals flooded here in the hope of future amnesties from Congress, while the newly legalized sneaked their wives and children into the country rather than have them wait for family-preference visas. The flow of illegals into the country rose to between 300,000 and

500,000 per year in the 1990s, so that a decade after the legislation that had supposedly solved the undocumented alien problem by reclassifying them as legal, the number of illegals living in the United States was back up to about 5 million, while today it's estimated at between 9 million and 13 million.

The flood of immigrants, both legal and illegal, from countries with poor, ill-educated populations, has yielded a mismatch between today's immigrants and the American economy and has left many workers poorly positioned to succeed for the long term. Unlike the immigrants of 100 years ago, whose skills reflected or surpassed those of the native workforce at the time, many of today's arrivals, particularly the more than half who now come from Central and South America, are farmworkers in their home countries who come here with little education or even basic training in blue-collar occupations like carpentry or machinery. (A century ago, farmworkers made up 35 percent of the U.S. labor force, compared with the under 2 percent who produce a surplus of food today.) Nearly two-thirds of Mexican immigrants, for instance, are high school dropouts, and most wind up doing either unskilled factory work or small-scale construction projects, or they work in service industries, where they compete for entry-level jobs against one another, against the adult children of other immigrants, and against native-born high school dropouts. Of the 15 industries employing the greatest percentage of foreign-born workers, half are low-wage service industries, including gardening, domestic household work, car washes, shoe repair, and janitorial work. To take one stark example: whereas 100 years ago, immigrants were half as likely as native-born workers to be employed in household service, today immigrants account for 27 percent of all domestic workers in the United States.

Although open-borders advocates say that these workers are simply taking jobs Americans don't want, studies show that the immigrants drive down wages of native-born workers and squeeze them out of certain industries. Harvard economists George Borjas and Lawrence Katz, for instance, estimate that low-wage immigration cuts the wages for the average native-born high school dropout by some 8 percent, or more than \$1,200 a year. Other economists find that the new workers also push down wages significantly for immigrants already here and native-born Hispanics.

Consequently, as the waves of immigration continue, the sheer number of those competing for low-skilled service jobs makes economic progress difficult. A study of the impact of immigration on New York City's restaurant business, for instance, found that 60 percent of immigrant workers do not receive regular raises, while 70 percent had never been promoted. One Mexican dishwasher aptly captured the downward pressure that all these arriving workers put on wages by telling the study's authors about his frustrating search for a 50-cent raise after working for \$6.50 an hour: "I visited a few restaurants asking for \$7 an hour, but they only offered me \$5.50 or \$6," he said. "I had to beg [for a job]."

Similarly, immigration is also pushing some native-born workers out of jobs, as Kenyon College economists showed in the California nail-salon workforce. Over a 16-year period starting in the late 1980s, some 35,600 mostly Vietnamese immigrant women flooded into the industry, a mass migration that equaled the total number of jobs in the industry before the immigrants arrived. Though the new workers created a labor surplus that led to lower prices, new services, and somewhat more demand, the economists estimate that as a result, 10,000 native-born workers either left the industry or never bothered entering it.

In many American industries, waves of low-wage workers have also retarded investments that might

lead to modernization and efficiency. Farming, which employs a million immigrant laborers in California alone, is the prime case in point. Faced with a labor shortage in the early 1960s, when President Kennedy ended a 22-year-old guest-worker program that allowed 45,000 Mexican farmhands to cross over the border and harvest 2.2 million tons of California tomatoes for processed foods, farmers complained but swiftly automated, adopting a mechanical tomato-picking technology created more than a decade earlier. Today, just 5,000 better-paid workers—one-ninth the original workforce—harvest 12 million tons of tomatoes using the machines.

The savings prompted by low-wage migrants may even be minimal in crops not easily mechanized. Agricultural economists Wallace Huffman and Alan McCunn of Iowa State University have estimated that without illegal workers, the retail cost of fresh produce would increase only about 3 percent in the summer-fall season and less than 2 percent in the winter-spring season, because labor represents only a tiny percent of the retail price of produce and because without migrant workers, America would probably import more foreign fruits and vegetables. “The question is whether we want to import more produce from abroad, or more workers from abroad to pick our produce,” Huffman remarks.

For American farmers, the answer has been to keep importing workers—which has now made the farmers more vulnerable to foreign competition, since even minimum-wage immigrant workers can’t compete with produce picked on farms in China, Chile, or Turkey and shipped here cheaply. A flood of low-priced Turkish raisins several years ago produced a glut in the United States that sharply drove down prices and knocked some farms out of business, shrinking total acreage in California devoted to the crop by one-fifth, or some 50,000 acres. The farms that survived are now moving to mechanize swiftly, realizing that no amount of cheap immigrant labor will make them competitive.

As foreign competition and mechanization shrink manufacturing and farmworker jobs, low-skilled immigrants are likely to wind up farther on the margins of our economy, where many already operate. For example, although only about 12 percent of construction workers are foreign-born, 100,000 to 300,000 illegal immigrants have carved a place for themselves as temporary workers on the fringes of the industry. In urban areas like New York and Los Angeles, these mostly male illegal immigrants gather on street corners, in empty lots, or in Home Depot parking lots to sell their labor by the hour or the day, for \$7 to \$11 an hour.

That’s far below what full-time construction workers earn, and for good reason. Unlike the previous generations of immigrants who built America’s railroads or great infrastructure projects like New York’s bridges and tunnels, these day laborers mostly do home-improvement projects. A New York study, for instance, found that four in ten employers who hire day laborers are private homeowners or renters wanting help with cleanup chores, moving, or landscaping. Another 56 percent were contractors, mostly small, nonunion shops, some owned by immigrants themselves, doing short-term, mostly residential work. The day laborer’s market, in other words, has turned out to be a boon for homeowners and small contractors offering their residential clients a rock-bottom price, but a big chunk of the savings comes because low-wage immigration has produced such a labor surplus that many of these workers are willing to take jobs without benefits and with salaries far below industry norms.

Because so much of our legal and illegal immigrant labor is concentrated in such fringe, low-wage employment, its overall impact on our economy is extremely small. A 1997 National Academy of

Sciences study estimated that immigration's net benefit to the American economy raises the average income of the native-born by only some \$10 billion a year—about \$120 per household. And that meager contribution is not the result of immigrants helping to build our essential industries or making us more competitive globally but instead merely delivering our pizzas and cutting our grass. Estimates by pro-immigration forces that foreign workers contribute much more to the economy, boosting annual gross domestic product by hundreds of billions of dollars, generally just tally what immigrants earn here, while ignoring the offsetting effect they have on the wages of native-born workers.

If the benefits of the current generation of migrants are small, the costs are large and growing because of America's vast range of social programs and the wide advocacy network that strives to hook low-earning legal and illegal immigrants into these programs. A 1998 National Academy of Sciences study found that more than 30 percent of California's foreign-born were on Medicaid—including 37 percent of all Hispanic households—compared with 14 percent of native-born households. The foreign-born were more than twice as likely as the native-born to be on welfare, and their children were nearly five times as likely to be in means-tested government lunch programs. Native-born households pay for much of this, the study found, because they earn more and pay higher taxes—and are more likely to comply with tax laws. Recent immigrants, by contrast, have much lower levels of income and tax compliance (another study estimated that only 56 percent of illegals in California have taxes deducted from their earnings, for instance). The study's conclusion: immigrant families cost each native-born household in California an additional \$1,200 a year in taxes.

Immigration's bottom line has shifted so sharply that in a high-immigration state like California, native-born residents are paying up to ten times more in state and local taxes than immigrants generate in economic benefits. Moreover, the cost is only likely to grow as the foreign-born population—which has already mushroomed from about 9 percent of the U.S. population when the NAS studies were done in the late 1990s to about 12 percent today—keeps growing. And citizens in more and more places will feel the bite, as immigrants move beyond their traditional settling places. From 1990 to 2005, the number of states in which immigrants make up at least 5 percent of the population nearly doubled from 17 to 29, with states like Arkansas, South Dakota, South Carolina, and Georgia seeing the most growth. This sharp turnaround since the 1970s, when immigrants were less likely to be using the social programs of the Great Society than the native-born population, says Harvard economist Borjas, suggests that welfare and other social programs are a magnet drawing certain types of immigrants—nonworking women, children, and the elderly—and keeping them here when they run into difficulty.

Not only have the formal and informal networks helping immigrants tap into our social spending grown, but they also get plenty of assistance from advocacy groups financed by tax dollars, working to ensure that immigrants get their share of social spending. Thus, the Newark-based New Jersey Immigration Policy Network receives several hundred thousand government dollars annually to help doctors and hospitals increase immigrant enrollment in Jersey's subsidized health-care programs. Casa Maryland, operating in the greater Washington area, gets funding from nearly 20 federal, state, and local government agencies to run programs that “empower” immigrants to demand benefits and care from government and to “refer clients to government and private social service programs for which they and their families may be eligible.”

Pols around the country, intent on currying favor with ethnic voting blocs by appearing immigrant-

friendly, have jumped on the benefits-for-immigrants bandwagon, endorsing “don’t ask, don’t tell” policies toward immigrants who register for benefits, giving tax dollars to centers that find immigrants work and aid illegals, and enacting legislation prohibiting local authorities from cooperating with federal immigration officials. In New York, for instance, Mayor Michael Bloomberg has ordered city agencies to ignore an immigrant’s status in providing services. “This policy’s critical to encourage immigrant day laborers to access . . . children’s health insurance, a full range of preventive primary and acute medical care, domestic violence counseling, emergency shelters, police protection, consumer fraud protections, and protection against discrimination through the Human Rights Commission,” the city’s Immigrant Affairs Commissioner, Guillermo Linares, explains.

Almost certainly, immigrants’ participation in our social welfare programs will increase over time, because so many are destined to struggle in our workforce. Despite our cherished view of immigrants as rapidly climbing the economic ladder, more and more of the new arrivals and their children face a lifetime of economic disadvantage, because they arrive here with low levels of education and with few work skills—shortcomings not easily overcome. Mexican immigrants, who are up to six times more likely to be high school dropouts than native-born Americans, not only earn substantially less than the native-born median, but the wage gap persists for decades after they’ve arrived. A study of the 2000 census data, for instance, shows that the cohort of Mexican immigrants between 25 and 34 who entered the United States in the late 1970s were earning 40 to 50 percent less than similarly aged native-born Americans in 1980, but 20 years later they had fallen even further behind their native-born counterparts. Today’s Mexican immigrants between 25 and 34 have an even larger wage gap relative to the native-born population. Adjusting for other socioeconomic factors, Harvard’s Borjas and Katz estimate that virtually this entire wage gap is attributable to low levels of education.

Meanwhile, because their parents start off so far behind, the American-born children of Mexican immigrants also make slow progress. First-generation adult Americans of Mexican descent studied in the 2000 census, for instance, earned 14 percent less than native-born Americans. By contrast, first-generation Portuguese Americans earned slightly more than the average native-born worker—a reminder of how quickly immigrants once succeeded in America and how some still do. But Mexico increasingly dominates our immigration flows, accounting for 43 percent of the growth of our foreign-born population in the 1990s.

One reason some ethnic groups make up so little ground concerns the transmission of what economists call “ethnic capital,” or what we might call the influence of culture. More than previous generations, immigrants today tend to live concentrated in ethnic enclaves, and their children find their role models among their own group. Thus the children of today’s Mexican immigrants are likely to live in a neighborhood where about 60 percent of men dropped out of high school and now do low-wage work, and where less than half of the population speak English fluently, which might explain why high school dropout rates among Americans of Mexican ancestry are two and a half times higher than dropout rates for all other native-born Americans, and why first-generation Mexican Americans do not move up the economic ladder nearly as quickly as the children of other immigrant groups.

In sharp contrast is the cultural capital transmitted by Asian immigrants to children growing up in predominantly Asian-American neighborhoods. More than 75 percent of Chinese immigrants and 98 percent of South Asian immigrants to the U.S. speak English fluently, while a mid-1990s study of

immigrant households in California found that 37 percent of Asian immigrants were college graduates, compared with only 3.4 percent of Mexican immigrants. Thus, even an Asian-American child whose parents are high school dropouts is more likely to grow up in an environment that encourages him to stay in school and learn to speak English well, attributes that will serve him well in the job market. Not surprisingly, several studies have shown that Asian immigrants and their children earn substantially more than Mexican immigrants and their children.

Given these realities, several of the major immigration reforms now under consideration simply don't make economic sense—especially the guest-worker program favored by President Bush and the U.S. Senate. Careful economic research tells us that there is no significant shortfall of workers in essential American industries, desperately needing supplement from a massive guest-worker program. Those few industries now relying on cheap labor must focus more quickly on mechanization where possible. Meanwhile, the cost of paying legal workers already here a bit more to entice them to do such low-wage work as is needed will have a minimal impact on our economy.

The potential woes of a guest-worker program, moreover, far overshadow any economic benefit, given what we know about the long, troubled history of temporary-worker programs in developed countries. They have never stemmed illegal immigration, and the guest workers inevitably become permanent residents, competing with the native-born and forcing down wages. Our last guest-worker program with Mexico, begun during World War II to boost wartime manpower, grew larger in the postwar era, because employers who liked the cheap labor lobbied hard to keep it. By the mid-1950s, the number of guest workers reached seven times the annual limit during the war itself, while illegal immigration doubled, as the availability of cheap labor prompted employers to search for ever more of it rather than invest in mechanization or other productivity gains.

The economic and cultural consequences of guest-worker programs have been devastating in Europe, and we risk similar problems. When post-World War II Germany permitted its manufacturers to import workers from Turkey to man the assembly lines, industry's investment in productivity declined relative to such countries as Japan, which lacked ready access to cheap labor. When Germany finally ended the guest-worker program once it became economically unviable, most of the guest workers stayed on, having attained permanent-resident status. Since then, the descendants of these workers have been chronically underemployed and now have a crime rate double that of German youth.

France has suffered similar consequences. In the post-World War II boom, when French unemployment was under 2 percent, the country imported an industrial labor force from its colonies; by the time France's industrial jobs began evaporating in the 1980s, these guest workers and their children numbered in the millions, and most had made little economic progress. They now inhabit the vast housing projects, or *cités*, that ring Paris—and that have recently been the scene of chronic rioting. Like Germany, France thought it was importing a labor force, but it wound up introducing a new underclass.

"Importing labor is far more complicated than importing other factors of production, such as commodities," write University of California at Davis prof Philip Martin, an expert on guest-worker programs, and Michael Teitelbaum, a former member of the U.S. Commission on Immigration Reform. "Migration involves human beings, with their own beliefs, politics, cultures, languages, loves, hates,

histories, and families.”

If low-wage immigration doesn't pay off for the United States, legalizing illegals already here makes as little sense as importing new rounds of guest workers. The Senate and President Bush, however, aim to start two-thirds of the 11 million undocumented aliens already in the country on a path to legalization, on the grounds that only thus can America assimilate them, and only through assimilation can they hope for economic success in the United States. But such arguments ignore the already poor economic performance of increasingly large segments of the *legal* immigrant population in the United States. Merely granting illegal aliens legal status won't suddenly catapult them up our mobility ladder, because it won't give them the skills and education to compete.

At the same time, legalization will only spur new problems, as our experience with the 1986 immigration act should remind us. At the time, then-congressman Charles Schumer, who worked on the legislation, acknowledged that it was “a riverboat gamble,” with no certainty that it would slow down the waves of illegals. Now, of course, we know that the legislation had the opposite effect, creating the bigger problem we now have (which hasn't stopped Senator Schumer from supporting the current legalization proposals). The legislation also swamped the Immigration and Naturalization Service with masses of fraudulent, black-market documents, so that it eventually rubber-stamped tens of thousands of dubious applications.

If we do not legalize them, what can we do with 11 million illegals? Ship them back home? Their presence here is a *fait accompli*, the argument goes, and only legalization can bring them above ground, where they can assimilate. But that argument assumes that we have only two choices: to decriminalize or deport. But what happened after the first great migration suggests a third way: to end the economic incentives that keep them here. We could prompt a great remigration home if, first off, state and local governments in jurisdictions like New York and California would stop using their vast resources to aid illegal immigrants. Second, the federal government can take the tougher approach that it failed to take after the 1986 act. It can require employers to verify Social Security numbers and immigration status before hiring, so that we bar illegals from many jobs. It can deport those caught here. And it can refuse to give those who remain the same benefits as U.S. citizens. Such tough measures do work: as a recent Center for Immigration Studies report points out, when the federal government began deporting illegal Muslims after 9/11, many more illegals who knew they were likely to face more scrutiny voluntarily returned home.

If America is ever to make immigration work for our economy again, it must reject policies shaped by advocacy groups trying to turn immigration into the next civil rights cause or by a tiny minority of businesses seeking cheap labor subsidized by the taxpayers. Instead, we must look to other developed nations that have focused on luring workers who have skills that are in demand and who have the best chance of assimilating. Australia, for instance, gives preferences to workers grouped into four skilled categories: managers, professionals, associates of professionals, and skilled laborers. Using a straightforward “points calculator” to determine who gets in, Australia favors immigrants between the ages of 18 and 45 who speak English, have a post-high school degree or training in a trade, and have at least six months' work experience as everything from laboratory technicians to architects and surveyors to information-technology workers. Such an immigration policy goes far beyond America's employment-based immigration categories, like the H1-B visas, which account for about 10 percent of

our legal immigration and essentially serve the needs of a few Silicon Valley industries.

Immigration reform must also tackle our family-preference visa program, which today accounts for two-thirds of all legal immigration and has helped create a 40-year waiting list. Lawmakers should narrow the family-preference visa program down to spouses and minor children of U.S. citizens and should exclude adult siblings and parents.

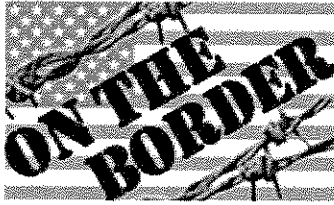
America benefits even today from many of its immigrants, from the Asian entrepreneurs who have helped revive inner-city Los Angeles business districts to Haitians and Jamaicans who have stabilized neighborhoods in Queens and Brooklyn to Indian programmers who have spurred so much innovation in places like Silicon Valley and Boston's Route 128. But increasingly over the last 25 years, such immigration has become the exception. It needs once again to become the rule.

TOP STORY ■■■

FRIDAY, SEPTEMBER 02, 2005

Immigration bedevils state lawmakers

By Mark K. Matthews, Stateline.org Staff Writer



In August, Democratic Govs. Janet Napolitano of Arizona and Bill Richardson of New Mexico declared a state of emergency. Smuggling and illegal immigration had reached a crisis along the Mexican border, and they needed millions of extra dollars to deal with the problems.

It was an uncommon show of solidarity on immigration policy. Before their collective cry for help, these neighboring states had been swerving apart.

In the past few months, Arizona has adopted the nation's toughest laws against those living here illegally, barring benefits to illegal immigrants and denying public funding to migrant work centers. Meanwhile, New Mexico became the ninth state to offer lower, in-state college tuition to illegal immigrants, even making them eligible for scholarships.

What drove these states together was frustration at lack of a coherent federal policy on immigration.

Inundated by millions of illegal newcomers, states in the Southwest and beyond are taking more immigration matters into their own hands. While immigration is considered a federal issue, at the moment it is state politicians from towns such as Mesa, Ariz.; Durham, N.C., and Silver City, N.M., who are redefining how America copes with an estimated 11 million illegal residents, more than half from Mexico.

The result is a patchwork of new state laws retooling workers' rights, driver's license eligibility, taxpayer-funded benefits and criminal justice for illegal immigrants. Like Arizona and New Mexico, states are taking different tacks. Nearly as many new state laws help illegal immigrants as hinder them.

"The broad phenomenon is that states have to grapple with the issue of immigration because of failure on behalf of the federal government," said Mark Krikorian, executive director for the Washington, D.C.-based Center for Immigration Studies, which favors tighter immigration controls. "The state and localities end up holding the bag."

Whether states are welcoming or forbidding to illegal immigrants isn't as simple as a red-state, blue-state divide.

"It's not an issue that breaks down conveniently R vs. D," said Douglas Rivlin, spokesman for the National Immigration Forum, which supports broader rights for immigrants. "Like a lot of issues, the more experience you have, the more you know how to deal with it."

Illegal immigrant education

Nine states -- **California, Illinois, Kansas, New Mexico, New York, Oklahoma, Texas, Utah and Washington** -- now allow illegal immigrants who grew up in the state to attend public colleges at in-state tuition rates. **New Mexico, Oklahoma and Texas** also offer scholarships to illegal immigrant students.

Numbers shed light on the story. Almost two-thirds of illegal immigrants live in just eight states, according to estimates from the Pew Hispanic Center, which like *Stateline.org* is funded by The Pew Charitable Trusts. California, Texas, Florida and New York top the list, followed by Arizona, Illinois, New Jersey and North Carolina.

But since the mid-1990s, more migrants are choosing to live in states that previously had only relatively small numbers of foreign-born residents, legal or illegal, according to the Center. Thus, 17 states, including Arizona, North Carolina, Georgia and Tennessee, are dealing for the first time with sizeable concentrations of illegal immigrants.

What seems to be driving immigration politics in some states is growing resentment of the new waves of immigrants, ranging from the rise of "Minuteman Project" citizen militias in Arizona and at least 22 other states to the case this spring of two police chiefs in New Hampshire who tried to use trespassing laws to arrest illegal immigrants.

That simmering backlash is a political undercurrent that could cause problems for President Bush, who is planning a new push this fall to revive his own immigration reform proposal that would grant guest-worker permits to undocumented migrants.

Frustration at illegal immigration already is creeping into state elections, creating what could be a wedge issue.

Republicans in Arizona are accusing Democratic Gov. Janet Napolitano, who faces re-election in 2006, of being soft on the waves of foreigners sneaking in from Mexico by the hundreds of thousands. Just months before the November 2005 election, Virginia GOP gubernatorial candidate Jerry Kilgore has jumped into a local dispute to oppose funding for a migrant laborer's work center.

California Gov. Arnold Schwarzenegger (R) has applauded Arizona's Minuteman militia and announced his support for a fence near San Diego to keep out illegal immigrants from Mexico.

Politicians in states such as Georgia, North Carolina and Oregon are facing pressure to address illegal immigration. Plus, predictions are that as many as 11 states will try to put initiatives on the 2006 ballot that copy Arizona's recent ban against using taxpayer dollars to help illegal immigrants.

Backlash against illegal immigrants

State efforts against illegal immigration had been chilled since the political fallout from California's adoption of Proposition 187 in 1994. The ballot initiative, later thrown out in court, sought to cut off social services for illegal immigrants, even free public schooling for the children. Its passage, championed by then-Gov. Pete Wilson (R), boomeranged against Republicans. It spurred Hispanic voters to mobilize and pushed the GOP out of power until Schwarzenegger reclaimed the governor's seat two years ago.

Arizona broke the ice in November 2004 when 55.6 percent of statewide voters adopted a ballot initiative -- Proposition 200 -- to prohibit undocumented immigrants from registering to vote and receiving taxpayer-funded social services.

There was little practical effect on illegal immigrants' lives, because federal law already makes them ineligible to vote or receive most benefits -- outside of emergency health care and public

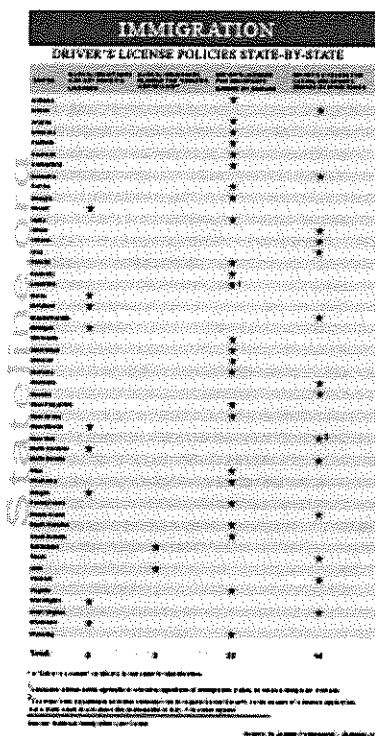
schooling for children. But the victory unleashed a bevy of bills in the Arizona Legislature attacking the rights and benefits of undocumented immigrants, and resulted in enactment of a handful. ([Click here for an in-depth look at Arizona and immigration](#)).

Other states have followed suit. In March, Democratic Gov. Mark Warner of Virginia signed a bill to prevent illegal immigrants from accessing social benefits and to require state workers to verify an applicant's immigration status.

"I truly believe the tide is turning," said Susan Tully, the Midwest field director for the Federation for American Immigration Reform, which supports tighter borders. "Next year, you are going to see more legislation that is going to cut funding to illegal aliens."

One of the newest tactics being pioneered by states is giving local police the power to arrest immigrants who are here illegally, a job usually reserved for federal agents. This year, Arkansas became the third state to authorize training that eventually will allow select state troopers to double as immigration officials. Florida and Alabama have a similar policy.

States also have sought to exclude illegal immigrants from obtaining state-issued driver's licenses. All but nine states now bar illegal immigrants from getting a driver's license, either through state law or administrative policy. (See chart) But this is one area where Congress has taken steps in reaction to homeland security concerns.



Click the image above (and expand the new window fully) for a state-by-state breakdown of driver's licenses for illegal immigrants. Or [download a PDF](#). (File size = 42kb)

business."

In May, Bush signed the "Real ID" act, which forbids illegal immigrants from receiving a full-fledged driver's license. The law, set to take effect in 2008, preempts state laws -- reversing the nine states that wanted to license illegal immigrant drivers. States now will have the option of issuing "driver's certificates," adopted so far in Tennessee and Utah, that can't be used for identification purposes.

Organizers in 11 states are seeking to copy Arizona's Prop 200 with ballot initiatives of their own to bar social services to illegal immigrants, said Kristina Wilfore, executive director of the Ballot Initiative Strategy Center, a liberal-cause advocate in Washington D.C. "I expect this to be a significant area of ballot initiative in 2006," Wilfore said, listing Alabama, Arkansas, California, Colorado, Georgia, Massachusetts, Nebraska, Nevada, Virginia, Tennessee and Washington state.

In Colorado, where the illegal population has climbed to at least 200,000, a coalition of state and federal legislators has rallied behind a similar proposal that would impose restrictions on illegal immigrants' access to services. U.S. Rep. Tom Tancredo (R), one of the most vocal leaders of the movement, said the goal is to "make it more difficult for people who are here illegally to do their day-to-day

Immigrant advocates fight back

But not all state action is to clamp down on illegal immigrants. In some cases, states are moving to incorporate them better into society, building support around health care and the increasingly popular idea of letting illegal immigrants pay in-state tuition to public colleges.

Nine states -- California, Illinois, Kansas, New Mexico, New York, Oklahoma, Texas, Utah and Washington -- allow illegal immigrants who grew up in the state to attend public colleges at in-state tuition rates. New Mexico, Oklahoma and Texas also offer scholarships to illegal immigrant students.

There have been other victories for those who support equal rights for illegal immigrants.

Illinois Gov. Rod Blagojevich (D) recently signed a bill to provide greater protection of day laborers, many of whom are illegal immigrants. The law imposes stiff penalties on employers who cheat day laborers, such as by illegally deducting meals or transportation from their paychecks, and creates new guidelines for hiring and paying these workers.

In early August, a Nevada state court ruled that illegal immigrants who work on public works projects must be paid as much as workers who are U.S. citizens.

Earlier this year, Washington state lawmakers reversed course and revived a law that provides health care to illegal immigrant children.

Currently, a handful of states -- including California, Massachusetts, New York and Washington -- provide non-emergency medical care to children, regardless of immigration status, according to the National Immigration Law Center, based in Los Angeles. Other states, such as Nebraska and New Jersey, provide blanket pre-natal care to expectant mothers.

"We are seeing a trend to take care of children at the same time there are efforts to restrict coverage for immigrants," said the law center's Tanya Broder, a staff attorney. "We are seeing that both waves are operating at the same time."

North Carolina more riled than Texas

As more illegal immigrants settle in states unaccustomed to a particular ethnic minority, the more political turmoil seems to mount.

For example, there is limited political rancor over illegal immigrants in Bush's home state of Texas, where Republicans control both the Statehouse and the governor's mansion. Texas has longstanding family and economic relationships with Mexican immigrants. Even with an estimated 1.4 million illegal residents, the second-highest number after California, the Lone Star State is "not exactly a hotbed of anti-immigrant sentiment," said Rivlin, of the National Immigration Forum.

Among states where immigrants traditionally have settled, both California and New York make pediatric health care and in-state tuition available to immigrants. This session, New Jersey legislators proposed studying the hardships of undocumented workers, while their counterparts in Illinois pushed to create an agency to help illegal immigrants who are victims of crime.

But in North Carolina, where Democrats control the governor's mansion and the Legislature, a few lawmakers received threatening e-mails after they introduced legislation to give in-state

tuition to illegal immigrants. North Carolina has seen explosive growth in its foreign-born population in the past 15 years. It now has an estimated 300,000 illegal residents, more than all but seven other states.

The proposal to give tuition benefits to illegal immigrants eventually failed. Now the North Carolina Legislature is close to finishing work on a bill that would deprive illegal immigrants of driver's licenses.

“Clearly the folks with less experience are trying to grapple with this new influx without the weapons,” says Ann Morse, an immigration analyst at the National Conference of State Legislatures.

This is the third in a series of *Stateline.org* articles on immigration in the states. See also:

[Arizona lashes out at illegal immigration](#)

[Lawmaker fights immigrant 'invasion'](#)

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Hiring Illegal Immigrants – Lawsuits by Legal Employees

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Newsletter: **Employment And Labor Update** - April 2006

Background

The U.S. Citizenship and Immigration Service (C.I.S.), formerly known as the U.S. Immigration and Naturalization Service (I.N.S.), requires employers to complete Form I-9 for each individual they hire for employment within three working days of the new employee's employment. On the form, the employer must verify the individual's employment eligibility by identifying documents presented by the employee and recording the document information on the Form I-9. Acceptable documents for this purpose are listed on the back of the Form I-9 and at the end of this article. (See Tables A-C for a listing of these documents.)

In completing this task, employers may not question a new employee's citizenship. They may only ask whether the individual is legally eligible to work in the United States. An individual who provides the appropriate paperwork, as listed on the Form I-9, is presumed to be eligible to work in the United States. Nonetheless, it has become apparent, especially in the construction industry, that a growing percentage of workers who are hired by contractors, have presented forged documents or have taken on someone else's identity.

With the sophisticated technology available today, it is difficult for employers to determine whether or not the paperwork they are given by new employees to verify their eligibility to work in the United States, is authentic. Many employers receive notices from the Social Security Administration (SSA) informing them that the social security numbers, which they have provided for employees do not match with the information maintained by the SSA. Still, the employers are warned not to take adverse action against these employees, but to only verify that the information they have provided to the SSA is accurate based upon information obtained from the employee. As a result, unless the employer has evidence to the contrary, it must assume that the paperwork is valid.

For the most part, construction employers are satisfied with the process they are required to perform to verify employment eligibility. They have little or no resources to investigate whether paperwork is authentic or fake. Some may believe that an illegal immigrant will work harder and will avoid filing worker's compensation claims than an employee legally in the United States.

Actions Against Employers

Employees who are legally eligible to work in the United States ("legal employees"), and who work side by side with illegal immigrants, resent the employment of illegal immigrant workers. Indeed, they have begun to fight back. In a series of recent lawsuits, employees have sued their employers claiming that the employers knowingly hired illegal immigrants in order to keep wages low and unions out of the workplace.

In *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), a class of legal employees alleged that two employers and their labor recruiter artificially deflated wages by means of a racketeering scheme to hire illegal workers at very low wages. Specifically, the legal employees claimed that these employers knowingly hired illegal immigrants in violation of immigration law, and that they were direct victims of the alleged illegal conduct with resulting damages by way of lower wages. The Ninth Circuit disagreed with the trial court's finding that the alleged damages to the workers were indirect and too speculative. Rather, the Ninth Circuit ruled that the legal employees could show they were direct victims of the alleged illegal conduct and that the alleged damages were plausible enough to survive a motion to dismiss. Back at the trial court level, this case has now been certified as a class action.

Similar allegations have also been made by legal employees in *Trollinger v. Tyson Foods Inc.*, 370 F.3d 602 (6th Cir. 2004) and *Williams v. Mohawk Industries Inc.*, 411 F.3d 1252 (11th Cir. 2005). Each of these cases have withstood motions to dismiss in the Sixth Circuit (reversing trial court's dismissal of case) and Eleventh Circuit (affirming trial court's decision denying dismissal of case), respectively. Both the Sixth and Eleventh Circuits specifically found that the legal employees alleged direct damages related to the hiring of illegal immigrants.

Only one case, to date, has dismissed similar allegations on the basis that the damages are too speculative and

the harm to the legal employees was indirect. In *Baker v. IBP Inc.*, 357 F.3d 685 (7th Cir. 2004), legal employees alleged that their employer and a labor recruiter operated a "scheme" to hire illegal workers who presented false documents. Unlike other cases noted above, the Seventh Circuit dismissed this case on several grounds. The grounds for dismissal included that the union, which bargained with the employer about wages, and was found to be an indispensable party, had not been sued by the employees. Furthermore, the employer and the recruiter did not have a shared purpose sufficient to allege a scheme. In addition, the court found that the alleged damages were too speculative.

Conclusion

Given these decisions, an employer should carefully review their employment eligibility procedures to make sure that it has taken the proper steps in verifying employee eligibility. Form I-9 should be filled out completely, dated and signed by the appropriate individuals. A photocopy of the documents relied upon to verify employment eligibility should be attached to the Form I-9 and placed in the employee's file. Form I-9 must be kept by the employer either for three years after the date of hire or for one year after employment is terminated, whichever is later. The form must be available for inspection by the authorized U.S. Government officials.

If an employer receives evidence that the documentation presented to verify employment eligibility has been stolen, is forged or is fake, the employer should conduct a prompt and thorough investigation. If the results of the investigation demonstrate that the paperwork submitted to verify employment eligibility is unreliable, the employee should be terminated for failure to produce evidence that he/she is legally eligible for employment. The investigation should also be documented. In addition, all employers should make it clear to recruiters not to provide any illegal workers. This clarification should be put in writing and repeated on a yearly basis.

Documentation to Review

The following is a list of acceptable documents an employee may use to document his/her employment eligibility. When verifying employment eligibility, the employer should examine one document from Table A. In the alternative, examine one document from Table B and one document from Table C, and record the title, number and expiration date, if any, of the documents.

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Readers' Opinions

Immigration

How has the influx of immigrants to the U.S.



changed the political and cultural landscape?

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By far the largest numbers of immigrants continue to live in the six states that have traditionally attracted them: California, New York, Texas, Florida, New Jersey and Illinois.

Immigrants also continue to flow into a handful of states in the Southeast, like Georgia and North Carolina, a trend that was discerned in the 2000 census.



INSIDE

But it is in the less-expected immigrant destinations that demographers find the most of interest in the new data.

Indiana saw a 34 percent increase in the number of immigrants; South Dakota saw a 44 percent rise; Delaware 32 percent; Missouri 31 percent; Colorado 28 percent; and New Hampshire 26 percent.

“It’s the continuation of a pattern that we first began to see 10 or 15 years ago,” said Jeff Passel, senior research associate at the Pew Hispanic Center, who has examined the new census data. “But instead of being confined to areas like the Southeast, it’s beginning to spill over into some Midwestern states, like Indiana and Ohio. It’s even moving up into New England.”

Over all, immigrants now make up 12.4 percent of the nation’s population, up from 11.2 percent in 2000. That amounts to an estimated 4.9 million additional immigrants for a total of 35.7 million, a number larger than the population of California.

Unlike the full census, which measures all population, the American Community Survey covers only what census officials call “household” population — that is, people living in households, rather than in “group quarters” like universities, long-term care facilities and prisons.

Thus, the 16 percent increase in immigrants since 2000 refers only to the

household population. (The nation's household population in 2005 was 288,378,137, up from 273,637,296 in 2000.)

From 1990 to 2000, the total population showed a 57 percent increase in the foreign-born population, to 31.1 million, from 19.8 million.

Still, the rise in the immigrant household population since 2000 seems to indicate that the blazing pace of immigration seen throughout the 1990's has continued into the first half of this decade.

And along with the increase in the overall number of immigrants, the survey found an increase in the numbers who are not United States citizens — an estimated 2.4 million more since 2000. The survey did not try to distinguish between noncitizens in the country legally, like students or guest workers, and those in the country illegally.

Georgia and North Carolina, states that had already seen significant increases in their immigrant population in the 1990's, continue to see rising numbers. In Georgia, for instance, foreign-born residents accounted for 7.2 percent of the state's population in 2000, and 9 percent in 2005.

"We've been getting very diverse down here," said Judy Hadley, statistical research analyst for the Georgia Office of Planning and Budget. "You name any country and we've got it."

Ms. Singer pointed out that much of the growth in immigrants was in "suburban areas and a lot of other places that really have no history of immigration."

Immigration was just one area covered by the first release of data from the American Community Survey, which also covered such demographic information as race, age, education and marital status.

The survey detected a significant increase in the number of Americans over

age 25 who hold a bachelor's degree or higher — 27.2 percent of that population in 2005 compared with 24.4 percent in 2000.

This contributes to what has been a half-decade surge in Americans' educational attainment. In 1940, only 4.6 percent of Americans held a bachelor's degree.

The survey found that the percentage of Americans who are 65 or over is shrinking, from 12.6 percent of the population in 1990 to 12.4 percent in 2000 and 12.1 percent in 2005.

Partly, this is driven by the huge influx in immigrants, who tend to be of working age or younger. But demographers caution against seeing this as a long-term trend.




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Brenda Goodman contributed reporting from Atlanta for this article.

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